Appendix C: Alaska Program Amendment Submittal, June 2, 2005 w/attachments

STATE OF ALASKA

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June 2, 2005

Mr. Eldon Hout, Director
Office of Ocean and Coastal Resource Management
National Oceanic and Atmospheric Administration
N/ORM 10th Floor SSMC #4
1305 East West Highway
Silver Spring, Maryland 20910

RE: Request for Amendment to the Alaska Coastal Management Program

Dear Mr. Hout:

The State of Alaska, Department of Natural Resources (DNR) is pleased to submit the attached document, The Alaska Coastal Management Program, As Amended, June 2, 2005, (amended ACMP), as a request for amendment to the Alaska Coastal Management Program (ACMP) per the requirements at 15 C.F.R. 923.81.

The amended ACMP is provided in response to written correspondence between the State of Alaska and your office. That correspondence culminated with Dr. Richard W. Spinrad's letter dated April 14, 2005, which articulated the final procedural and regulatory steps required for the Office of Ocean and Coastal Resource Management (OCRM) to make a finding of preliminary approval under CZMA section 306(e)(2).

DNR has worked hard on producing this amended ACMP document. The amended ACMP is comprehensive and detailed, satisfying all federal approval requirements set out in the CZMA and implementing regulations, including those specific issues identified in Dr. Spinrad's letter dated April 14, 2005. The document also addresses the relevant editorial and clarification items identified in OCRM's January 28, 2005 letter, as well as public requests for a user-friendly and meaningful description of the scope, applicability, and procedures of the ACMP. With such a comprehensive and responsive document, OCRM will now have the information necessary to initiate the National Environmental Protection Act (NEPA) process immediately after making a finding of preliminary approval.

Additionally, this document should enable all stakeholders the understanding of the program that will govern coastal management in Alaska into the foreseeable future.

We look forward to your review of this document and its attachments. As well, we look forward to your preliminary approval of the amended ACMP. In order for DNR to continue expending federal monies in the new fiscal year (beginning July 1, 2005) to implement the ACMP, we respectfully request that you complete your review of The Alaska Coastal Management Program, As Amended, June 2, 2005 and issue preliminary approval, as agreed to, no later than June 31, 2005.

As identified in past correspondence with your office, the NEPA process for the request to amend the ACMP will begin once you have issued preliminary approval. As you are aware, Governor Murkowski signed into law HCS CSSB 102(FIN) (SB 102) which, among other things, establishes January 1, 2006, as the deadline by which the NEPA process must be complete and OCRM has issued final approval of the amended ACMP. The Alaska legislature mandated in SB 102 that the failure to obtain federal approval of the amended ACMP by that deadline will result in the repeal and termination of the ACMP. I recognize and appreciate OCRM's repeated commitment to complete the NEPA process and render an approval decision on the amended ACMP by the January 1, 2006 deadline. DNR is similarly committed to securing approval of the amended ACMP by this deadline, and stands ready to assist OCRM in achieving this goal.

I look forward to your finding of preliminary approval of the amended ACMP. As well, we look forward to working with and assisting your office in satisfying the NEPA requirements, and confirming the amended ACMP's compliance with all applicable federal requirements. Please let me know how I or my staff can assist you in this request for amendment to the ACMP.

Sincerely,

Thomas E. Irwin
Commissioner

cc: Dr. Richard Spinrad, NOAA
Dr. Thomas Kitsos, NOAA
Alaska Congressional Delegation
Office of the Governor, ATTN: Chief of Staff
Office of the Governor, ATTN: Washington D.C. Office Director
Bill Jeffress, Director, DNR-OPMP

DEPARTMENT OF

NATURAL RESOURCES

The Alaska Coastal Management Program, As Amended

Office of Project Management and Permitting

June 2, 2005

Frank Murkowski
Governor

Thomas Irwin
Commissioner

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Preface

The State of Alaska has developed this program description of the Alaska Coastal Management Program (ACMP) at the request of the National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management (OCRM). The state has agreed to prepare this document because over the past twenty-five years, OCRM has approved 103 changes to Alaska's original program. The state believes a single, updated, and comprehensive program document will assist OCRM and the public in better understanding the scope and operation of the ACMP.

Chapter 1: Introduction to the Alaska Coastal Management Program

Section 1.1: Background and History of the ACMP

The State of Alaska's coastline consists of approximately 44,500[1] miles which, measured either on the tideline or measured around an average perimeter that parallels the mainland limits of the Territorial Sea, exceeds that of the entire continental United States. The Alaska coastal area has national and international significance for its vast, healthy ecosystems and is a generous source of renewable and non-renewable resources, especially proven and potential energy resources. Three-quarters of Alaska's people live on or near the coast. Many earn their living from direct use of coastal resources and many more from indirect uses, such as Alaska's growing tourist industry. The Native people of Alaska maintain a cultural and economic intimacy with the coast that dates back thousands of years.

Alaska began considering comprehensive coastal management in the mid-1970s, after passage of the federal Coastal Zone Management Act of 1972.

At the time, state and local interest in participating in coastal zone management resulted in part from ambitious plans for federal oil and gas leasing off Alaska's coasts. Several federal agencies managed large portions of Alaska (over 60%) and Alaska's offshore areas, affecting the economies and lifestyles of local communities. Coastal communities also argued strongly for a voice in decisions that might affect their livelihood and way of life. Increasing demands for the use and enjoyment of Alaska's rich and diverse coastal resources (such as timber production, tourism, mining, fisheries, and oil and gas development) created a need for an effective forum for responsible development and resolving local issues. From its inception in 1972, the CZMA provided the various stakeholders and Alaska's coastal communities with that forum.

The Alaska Legislature enacted the Alaska Coastal Management Act (ACMA) on June 4, 1977, (ch 84 SLA 1977), which established the ACMP. In passing the ACMP, the Alaska Legislature noted several issues: waterfront space scarcity, energy resource development impacts, maintaining the fisheries, managing the forest resources, transportation needs and impacts, impacts of mining, impacts of Western culture on Native cultures, providing for the Alaska subsistence lifestyle, geological hazards, changing land ownership patterns, bottomfish, and

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[1] For purposes of NOAA's allotment formula, shoreline mileage is defined as the "tidal shoreline" mileage listed in the NOAA publication "*The Coastline of the United States*." In this publication, tidal shoreline is defined to include the shoreline of the outer coast, offshore islands, sounds, bays, rivers, and creeks, to the head of tidewater or to where tidal waters narrow to a width of 100 feet. The mileage was determined by using a recording device on large scale charts. NOAA's publication lists Alaska's shoreline as 33,904 miles. However, more recent measurements identify Alaska's accurate shoreline measurement at approximately 44,500 miles.

governmental regulation. To address these issues, the legislature made the following findings about the state's coastal area, which apply as much today as they did in 1977:

(1) The coastal area of the state is a distinct and valuable natural resource of concern to all the people of the state;
(2) the demands upon the resources of the coastal area are significant and will increase in the future;
(3) the protection of the natural and scenic resources and the fostering of wise development of the coastal area are of concern to present and future citizens of the state;
(4) the capacity of the coastal area to withstand the demands upon it is limited;
(5) the degree of planning and resource allocation which has occurred in the coastal area has often been motivated by short-term considerations, unrelated to sound planning principles; and
(6) in order to promote the public health and welfare, there is a critical need to engage in comprehensive land and water use planning in coastal areas and to establish the means by which a planning process and management program involving the several governments and areas of the unorganized borough having an interest in the coastal area may be effectively implemented.

In 1978, Alaska adopted the Standards of the Alaska Coastal Management Program at 6 AAC 80 and the Guidelines for District Coastal Management Programs at 6 AAC 85 to implement the ACMP and to implement the finding of the Alaska Legislature. The Coastal Policy Council revised the original Standards and Guidelines in 1979, and ultimately guided the ACMP to final federal approval that same year.

Since ACMP approval in 1979, 33 coastal district plans and 33 areas meriting special attention and special area management plans have been approved. Another significant development occurred in the early 1980's when the coordinated consistency review process was adopted by regulation. The original ACMA did not include a specific process to determine a project's consistency with the statewide standards and coastal district enforceable policies. The regulations at 6 AAC 50, adopted in 1984, created the process for coordinating the permitting and consistency review of a project.

Another set of significant developments occurred in 1994 when the Legislature added a section addressing consistency reviews and included the first of a series of needed reforms in the consistency review process. A new section

AS 46.40.096, "Consistency Reviews and Determinations," was added to identify the key elements of the consistency review process (am § 2 ch 34 SLA 1994). AS 46.40.100(b) was amended to provide procedures for when and how certain parties can petition the Coastal Policy Council (CPC) during an ACMP consistency review (am §§ 3-6 ch 34 SLA 1994). The petitioner could seek CPC review as to whether the petitioner's comments had been fairly considered by the state agency coordinating the ACMP consistency review, whereupon the CPC could either dismiss the petition or remand the proposed consistency determination to the agency for reconsideration of the petitioner's comments. Another section was added, AS 46.40.094, to provide consistency determinations for phased uses and activities (sec. 8 ch. 38 SLA 1994).

The ACMP has evolved significantly since 1979. Each district coastal management plan, statutory or regulatory revision, or other program amendment that gains state and federal approval is incorporated into the ACMP. Today, two chapters of statutes, three chapters of regulations, 33 coastal district plans, and 33 areas meriting special attention and special area management plans are part of the ACMP.

Section 1.2: Objectives, Intent, and Approach of the ACMP

The legislature set forth at AS 46.40.020 the following objectives for the ACMP, which remain unchanged over its nearly thirty-year life:

(1) the use, management, restoration, and enhancement of the overall quality of the coastal environment;
(2) the development of industrial or commercial enterprises that are consistent with the social, cultural, historic, economic, and environmental interests of the people of the state;
(3) the orderly, balanced utilization and protection of the resources of the coastal area consistent with sound conservation and sustained yield principles;
(4) the management of coastal land and water uses in such a manner that, generally, those uses which are economically or physically dependent on a coastal location are given higher priority when compared to uses which do not economically or physically require a coastal location;
(5) the protection and management of significant historic, cultural, natural, and aesthetic values and natural systems or processes within the coastal area;
(6) the prevention of damage to or degradation of land and water reserved for their natural values as a result of inconsistent land or water usages adjacent to that land;

(7) the recognition of the need for a continuing supply of energy to meet the requirements of the state and the contribution of a share of the state's resources to meet national energy needs; and
(8) the full and fair evaluation of all demands on the land and water in the coastal area.

When the legislature addressed the coastal issues it identified in 1978, it developed a comprehensive management program to satisfy the requirements of the CZMA and as the general solution to managing important coastal resources, and set forth basic program policy in Section 2 of the Alaska Coastal Management Act:

(1) preserve, protect, develop, use, and where necessary, restore or enhance the coastal resources of the state for this and succeeding generations;
(2) encourage coordinated planning and decision making in the coastal area among levels of government and citizens engaging in or affected by activities involving the coastal resources of the state;
(3) develop a management program which sets out policies, objectives, standards and procedures to guide and resolve conflicts among public and private activities involving the use of resources which have a direct and significant impact upon the coastal land and water of the state;
(4) assure the participation of the public, local governments, and agencies of the state and federal governments in the development and implementation of a coastal management program;
(5) utilize existing governmental structures and authorities, to the maximum extent feasible, to achieve the policies set out in this section; and
(6) authorize and require state agencies to carry out their planning duties, powers and responsibilities and take actions authorized by law with respect to the programs affecting the use of the resources of the coastal area in accordance with the policies set out in this section and the guidelines and standards adopted by the Alaska Coastal Policy Council under AS 46.40.

The articulation of the Program's objectives from 1978 carries through to today. So does the explanation that, while the ACMP is a program of government, the private sector is viewed as a partner in coastal management. This partnership applies to the business community, public interest groups, environmental organizations and, rural interests as well as the public at large. Certainly, the ACMP has environmental goals, but these goals are part of a spectrum of management goals set forth as policies for the program by the legislature.

Continued development of Alaska's coastal resources is vital to both the state and local economies and to national interests as well. Local governments, aside from being closest to coastal issues, are also most familiar with local conditions and have the traditional political right and responsibility to govern local land use on city owned land within their municipal boundaries. Alaska is little different from other states in this respect. Thus, the reader will note an emphasis on state management and use of coastal resources, with local input on matters of local knowledge and concern. Through this management philosophy, state, local, national, and private goals and aspirations which depend on the use of coastal resources can be met through an open planning and management process where interested parties can be brought together to resolve their differences and eliminate potential conflicts before more serious problems occur.

With this in mind, the legislature called on local governments to prepare plans to govern the use of coastal resources in their areas. At the same time, a state level element was established by the formation of the Alaska CPC. The CPC, made up of state agency and local government officials, provided overall leadership for the program and established the basic guidelines and standards to be used by the local governments in the development of their coastal plans and by state agencies in making coastal permitting and management decisions. While the CPC no longer exists, the ACMP was designed, and continues to operate, as a "networked" program. Rather than establishing its own comprehensive coastal permitting structure, Alaska instead coordinates existing agencies' authorization and permitting authorities and processes to determine whether a given use is consistent with the standards and objectives of the ACMP.

Alaska's program is voluntary at the local level. But the networking process encourages local land use planning which, coupled with statewide policies, provide coordinated, intergovernmental evaluation of a proposed coastal project. The process involves a partnership between the project review team, the applicant, the coastal districts, state/federal agencies, and the public. The ACMP thus places emphasis upon coordination between state, local, national, and private interests in the management and use of coastal resources. The networking approach satisfies Alaska's commitment to properly manage the competing demands upon, preservation of, and sustainable use of, its precious coastal resources.

Chapter 2: Boundaries of the ACMP

The CZMA at 16 U.S.C. § 1455(d)(2)(A) requires the management program for each coastal state to include "An identification of the boundaries of the coastal zone subject to the management program." Coastal zone management regulations 15 CFR § 923.31-.34 divide the boundaries into four elements: the inland boundary, the seaward boundary, areas excluded from the coastal zone and interstate boundaries (the last of which do not apply to Alaska).

As required by 15 CFR 923.31(a)(1)-(7), inland boundaries of the state's coastal program must include certain areas, as follows:

> *(1) Those areas the management of which is necessary to control uses which have direct and significant impact on coastal waters, or are likely to be affected by or vulnerable to sea level rise, pursuant to section 923.11 of these regulations.*
>
> *(2) Those special management areas identified pursuant to 923.21.*
>
> *(3) Waters under saline influence – waters containing a significant quantity of seawater, as defined by and uniformly applied by the State.*
>
> *(4) Salt marshes and wetlands – areas subject to regular inundation of tidal salt (or Great Lakes) waters which contain marsh flora typical of the region.*
>
> *(5) Beaches – the area affected by wave action directly from the sea. Examples are sandy beaches and rocky areas usually to the vegetation line.*
>
> *(6) Transitional and intertidal areas – areas subject to coastal storm surge, and areas containing vegetation that is salt tolerant and survives because of conditions associated with proximity to coastal waters. Transitional and intertidal areas also include dunes and rocky shores to the point of upland vegetation.*
>
> *(7) Islands – bodies of land surrounded by water on all sides. Islands must be included in their entirety, except when uses of interior portions of islands do not cause direct and significant impacts.*

Criteria for defining Alaska's coastal zone boundary are given at 11 AAC 114.220 of the ACMP. This discussion departs little from its original formulation in 1978.

The federal boundary requirements call for definable geographic boundaries, but the main criterion for determining the boundary is non-geographic, that is, one must forecast likely uses, survey the nature of the coastal zone, and determine a boundary on the basis of a mix of the findings from these efforts. Due to the impracticability of using this formula for the entire 44,500 miles of Alaskan

shoreline, the method used for determining the ACMP boundaries was to survey the general relationships between the marine environment and the terrestrial environment. These include geophysical relationships such as water flow, salt water intrusion, tidal actions, erosion, wave fetch, salt spray, flooding, storm and tsunami surges and run-up, ice movements, glacial activity and the like. The relationships also include biological links between the marine and terrestrial environments. These include the habits and habitats of anadromous fish, polar bears, sea birds, marine mammals such as walrus and seals, and other animals and plants that have a unique relationship to the land/water area. With all of these relationships established, the method simply declares that an impact on these relationships could result in an "impact on the coastal waters," but the ACMP went further, and declared that an impact on animals using the coastal waters, including anadromous fish, is part of the definition of impact on coastal waters.

The next step was to map these relationships. This was done in Biophysical Boundaries of Alaska's Coastal Zone, a set of 65 maps and commentary produced for ACMP by the Department of Fish and Game. This document identifies the "landward and seaward limits of coastal biological and physical processes which must be considered for effective long-term coastal management." This is accomplished by dividing the coastal zone into two sub-zones. The "zone of direct interaction" is "the portion of the coastal area where physical and biological processes are a function of direct contact between land and sea." "The zone of direct influence" is "the portion of the coastal zone extending seaward and landward from the zone of direct interaction…closely affected and influenced by the close proximity between land and sea." A third "zone of indirect influence" extends outward from the zone of direct influence to the limit of identifiable land/sea relationships. The "zone of indirect influence" is excluded from the state's legally-defined coastal zone because the land/sea relationships are considerably less direct or significant than those of the other zones.

The mention of the zone of indirect influence requires more abstract discussion. The federal coastal zone management requirements call for boundary settings that result in a boundary that will include uses which have a direct and significant impact on the coastal waters. In fact, however, it is possible to imagine inland activities that might have a direct and significant impact on the coastal waters. So the addition of the zone of indirect influence to the Biophysical Boundaries of Alaska's Coastal Zone recognizes that there are some possible circumstances where an inland event will have impact on the coastal waters, but stops short of including the entire state in the program boundaries. The purpose of including this zone is, in essence, informational. Back in 1978 when much of the mapping was performed, the Coastal Policy Council selected the line between the zone of direct influence and the zone of indirect influence as the official initial

boundary for ACMP, but participants in ACMP should not overlook the third area, and should consider the rationale that led to its establishment.

As an example of how the boundary system works, in the Beaufort Sea region, the zone of direct interaction extends landward to the extent of storm surge intrusion, averaging two to three miles inland, and seaward to the limit of shore fast ice and the shear zone. The zone of direct influence extends from the zone of direct interaction landward to include optimum water fowl and shorebird nesting habitat, and seaward into the ice pack. The zone of indirect influence extends to the limit of the coastal wet tundra ecosystem, corresponding to the 200-foot land contour and seaward to include major circumpolar and circumpacific migration patterns.

Districts may plan for areas within their political boundaries only. The ACMP does not geographically increase the jurisdiction of local governments in Alaska. As a coastal district initiates the development of their plan, they must base the initial coastal zone boundaries of the district on (and include) the zones of direct interaction and direct influence, as described in Biophysical Boundaries of Alaska's Coastal Zone. Final coastal zone boundaries for a district may diverge from the initial boundaries if they:

> *(1) extend inland and seaward to the extent necessary to manage a use or an activity that has or is likely to have direct and significant impact on coastal waters; and*
>
> *(2) include the following areas within the district, if present:*
>
> *(A) transitional and intertidal areas, salt marshes, saltwater wetlands, islands, and beaches; and*
>
> *(B) areas that are likely to be affected by or vulnerable to sea level rise.*

DNR, in reviewing new or revised coastal management plans for approval, must find that the proposed final boundaries meet the above criteria[2]. In addition, DNR must find that the final district boundaries are sufficiently compatible with those of adjoining areas to allow consistent administration of the ACMP.

The coastal zone boundaries of state owned land outside of coastal resource districts are established as the zone of direct interaction and direct influence.

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[2] However, as described further in this chapter, 11 AAC 114.220(f) "grandfathered" all existing and approved district coastal zone boundaries: "Notwithstanding any other provision of this section, coastal zone boundaries approved by the former Coastal Policy Council under former 6 AAC 85.040 and 6 AAC 85.150 and the United States Department of Commerce under former 6 AAC 85.175 and in effect on July 1, 2004 remain in effect."

Federal lands in Alaska are excluded from the coastal zone pursuant to the CZMA at 16 U.S.C. § 1453(1), which states, "Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents." Therefore, the coastal zone boundaries shown on ACMP boundary maps were drawn without regard to ownership, with the exception of federal land. Recognition of this exclusion is noted on the maps themselves.

The maps were drawn in this way for two reasons. First, and most importantly, large parcels of federal land move to non-federal ownership as a result of the Alaska Native Claims Settlement Act and the state's entitlement under the Statehood Act. When these transfers occur, certain lands excluded from the coastal zone by virtue of federal ownership are added to the coastal zone. The biophysical boundaries are mapped now to guide the state and districts in determining the areas subject to ACMP after future transfers.

Second, federal activities occurring on federal lands which result in impact on the state's coastal area must be consistent with the state coastal management program. If a federal agency knows where the biophysical boundary is, it will be easier to determine whether or not a proposed activity will have an impact on the coastal area, as the boundaries were drawn on the basis of the actual relationships of the coastal lands and waters.

Three additional points should be made to have full understanding of the boundaries. First, Alaska adjoins no other states so no effort is needed to coordinate boundary setting, as required by the federal coastal program approval regulations, although an effort will be initiated with Canada at such time as that nation, or its provinces, should begin a similar effort in coastal management, or if other reasons for such an effort appear as may be the case for OCS development in the arctic region.

Second, the three-mile limit is indeed the seaward boundary of Alaska's coastal zone, as required by law. However, the various zones shown on the boundary maps often run further seaward than the three-mile limit. This is done to show the relationship of offshore areas to onshore areas and the shoreline. The area beyond the three-mile limit is excluded under the terms of the CZMA, but federal activities on the outer continental shelf should be conducted with thought for impacts inside of the three-mile limit. The outer continental shelf seaward of the state's three-mile limit in federal waters is a "geographic location description" for purposes of federal consistency reviews under 15 C.F.R. 930.34(b) and 930.53(a). A federal activity on the OCS which causes effects on any Alaskan coastal use or

resource, as the term "effects" is defined in the CZMA at 15 C.F.R. 930.11(g), must be consistent with ACMP.

Third, the initial boundary maps do show an area on either side of the coastline called the "zone of indirect influence," as discussed above. This should be regarded as primarily informational for ACMP participants. However, the information provided for the zone of indirect influence should be considered in coastal decision-making, as major resource activities (such as large-scale mining or forestry operations), may have impacts of significant effect on coastal waters. In some cases, the zone of indirect influence may suggest the need to move district boundaries further inland in future coastal district plan revisions, following more detailed investigation of the land and coastal water relationships.

In general, the ACMP boundary system is designed to concentrate attention in the most critical areas where the need for management is the greatest, and to provide somewhat less attention to areas where management is not so critical. This results in a relative decrease in initial management and planning effort as one moves either inland or seaward from the shoreline.

In the regulations at 11 AAC 114.220(f), all existing district coastal zone boundaries were "grandfathered":

> *Notwithstanding any other provision of this section, coastal zone boundaries approved by the former Coastal Policy Council under former 6 AAC 85.040 and 6 AAC 85.150 and the United States Department of Commerce under former 6 AAC 85.175 and in effect on July 1, 2004 remain in effect.*

If a new district forms, or a district wishes to change its existing coastal zone boundaries, and the district intends to extend the final coastal zone boundary beyond the initial or existing boundaries, then the district would be required to demonstrate that the extension is "… necessary to manage a use or an activity that is likely to have a direct and significant impact on coastal waters…" 11 AAC 114.220(c).

"Coastal water" means "those waters, adjacent to the shorelines, that contain a measurable quantity or percentage of sea water, including sounds, bays, lagoons, ponds, estuaries, and tidally influenced waters." 11 AAC 112.990(6).

A "direct and significant impact," as used in 11 AAC 112 and 11 AAC 114, is defined at 11 AAC 114.990(13). For purposes of districts establishing their coastal zone boundaries or writing enforceable policies, the 11 AAC 114 definition provides that a direct and significant impact is

> *an effect of a use, or an activity associated with the use, that will proximately contribute to a material change or alteration of the coastal waters, and in which*
>
> *(A) the use, or activity associated with the use, would have a net adverse effect on the quality of the resources;*
>
> *(B) the use, or activity associated with the use, would limit the range of alternative uses of the resources; or*
>
> *(C) the use would, of itself, constitute a tolerable change or alteration of the resources but which, cumulatively, would have an adverse effect;*

Within AS 46.40.210(3), coastal use or resource is defined to mean "a land or water use or natural resource of the coastal zone" and includes "subsistence, recreation, public access, fishing, historic or archaeological resources, geophysical resources, and biological or physical resources found in the coastal zone on a regular or cyclical basis." For application purposes, the definition of "direct and significant impact" requires that there must be an established link between the effect of the use or activity on the coastal waters. It then establishes that the link may be demonstrated through effects on the quality of the resources, the range of alternative uses of the resources, or the cumulative effect of the use on the resource. Biotic and abiotic impacts are included as a reasonable demonstration of direct and significant impacts within the definition for purposes of justifying a boundary expansion or district enforceable policy.

Written description of the district boundaries are currently available online at **www.alaskacoast.state.ak.us**. The full set of ACMP boundary maps is available at either a scale of 1:250,000 or 1:500,000, and one scale or the other has already been provided to most ACMP participants. Another map shows the inland and seaward boundaries of Alaska's coastal zone as it exists now. Again, because of its scale, this map is only illustrative, and ACMP participants should obtain the more detailed maps for planning and management purposes.

Chapter 3: Organization of the ACMP

Section 3.1: The ACMP Lead Agency – The Office of Project Management and Permitting

The Office of Project Management and Permitting (OPMP), in the Commissioner's office of DNR, is the lead agency for the ACMP. The authority for this designation is included in the Alaska Statutes at AS 46.39, AS 46.40, and the Alaska Administrative Code at 11 AAC 110 and 11 AAC 114.

As the lead agency for the ACMP, OPMP administers the ACMP, with its broad duties and responsibilities set forth in AS 46.39:

> *Sec. 46.39.010. Coastal management duties; regulations.*
>
> *(a) The Department of Natural Resources shall render, on behalf of the state, all federal consistency determinations and certifications authorized by 16 U.S.C. 1456 (Sec. 307, Coastal Zone Management Act of 1972), and each conclusive state consistency determination when a project requires a permit, lease, or authorization from two or more state resource agencies.*
>
> *(b) The department may adopt regulations necessary to implement this chapter.*
>
> *(c) In this section,*
>
> *(1) "render" means to coordinate and issue;*
>
> *(2) "resource agency" means*
>
> *(A) the Department of Environmental Conservation;*
>
> *(B) the Department of Fish and Game; or*
>
> *(C) the Department of Natural Resources.*

OPMP's responsibilities can generally be described as follows:

- Technical Assistance to Coastal Districts. OPMP assists the coastal districts perform their duties by providing ACMP guidance, training and periodic teleconferences; by analyzing draft district coastal management plans for adequacy and compliance with the ACMP; working with the district representatives during consistency reviews and keeping them notified of meetings, projects, funding and other ACMP-related opportunities; and ensuring that the districts have appropriate standing and deference in the consistency review process.

- Coordinating Consistency Reviews. OPMP's project review coordinators facilitate consistency reviews for coastal projects requiring permits from more than one state agency, permits from a federal agency, or any federal

agency activity. They hold pre-application meetings with prospective applicants and mediate resolutions of issues among review participants. OPMP project review staff also work on a variety of statewide issues including conducting consistency reviews of statewide significance and coordinating unified state responses to federal activities.

- Arranging for Program Funding. OPMP acquires 16 U.S.C. § 1455 ("Section 306") program funding from the federal government through the federal Office of Ocean and Coastal Resource Management (OCRM). In addition, OPMP secures special project funds under the 16 U.S.C. § 1455(b) ("Section 6217") program, 16 U.S.C. § 1456b ("Section 309") program, 16 U.S.C. § 1456d ("Section 310") program.

- Public Education and Information. OPMP performs several education functions and provides information for coastal districts, applicants, agencies, and the public. Education includes: technical assistance/training to ACMP participants such as coastal district coordinators and applicants, and information about proposed legislation that might affect the ACMP. For example, OPMP conducts introductory "ACMP 101" training for new coastal district coordinators, and even a coastal management game for grades K-5. OPMP encourages networking, by coordinating a variety of conferences that bring together ACMP participants to discuss concerns and raise questions pertinent to ACMP issues and application. OPMP also publishes "Coastal Currents" to better inform ACMP participants about ACMP news and issues, and hosts a comprehensive website at www.alaskacoast.state.ak.us that contains valuable source materials, legal standards and guidance documents, public notices, and links to other sites providing valuable information about coastal management. OPMP maintains a library of documents, such as coastal district programs, research reports, compilations of policies and grant projects, as well as digital databases with the history and status of grant funding and project reviews, district enforceable policies, and ACMP contacts.

Section 3.2: State Agency Participation in the ACMP

There are several state agencies that "participate" in the implementation of the ACMP. Participation comes in many forms:

- Technical assistance and information sharing during the coastal district plan review process and the consistency process

- Technical assistance and information sharing during the consistency review of a proposed coastal project
- The issuance of permits for activities subject to the ACMP consistency review process
- Coordination and review of proposed coastal projects for consistency with the ACMP
- Monitoring and compliance reviews to ensure that projects adhere to ACMP and permit requirements
- Participation in special ACMP projects and initiatives, as needed
- Participation and agency representation on the ACMP Working Group

State agencies participating in the implementation of the ACMP receive ACMP and CZMA funding to perform their ACMP responsibilities. The state agencies participating in the implementation of the ACMP and receiving funding to do so include:

- Department of Commerce, Community and Economic Development
- Department of Environmental Conservation
- Department of Fish and Game
- Department of Law
- Department of Natural Resources
    1. Division of Agriculture
    2. Division of Geological and Geophysical Surveys
    3. Division of Forestry
    4. Division of Mining, Land and Water
    5. Division of Oil and Gas
    6. Division of Parks and Outdoor Recreation
    7. Joint Pipeline Office
    8. Office of Habitat Management and Permitting
    9. Public Information Center
- Department of Transportation and Public Facilities

Specific to the consistency review process described in 11 AAC 110, the state resource agencies' (the departments of Environmental Conservation, Fish and Game, and Natural Resources) authorities and responsibilities are defined as follows:

> ***11 AAC 110.040.*** *Review by the Department of Environmental Conservation of certain activities that are the subject of a district enforceable policy. (a) This section applies to projects that are subject only*

to one or more Department of Environmental Conservation authorizations under 11 AAC 110.010(d).

(b) In accordance with AS 46.40.096(k), if a district enforceable policy addresses an activity of a project subject to this section, but that activity is not subject to a Department of Environmental Conservation authorization under AS 46.40.040(b)(1), then that department shall review the activity against the applicable district enforceable policies and statewide standards.

(c) The Department of Environmental Conservation, or the office, if agreed to by that department and the office, shall conduct the consistency review described in (b) of this section using the procedures set out in 11 AAC 110.200 – 11 AAC 110.270 after determining the scope of the activities subject to review in consultation with the coastal district.

11 AAC 110.050. State agency authority and responsibility. *(a) Nothing in this chapter displaces or diminishes the authority of a state agency with respect to coastal uses and resources under that agency's own statutory and regulatory authorities.*

(b) As provided in this chapter, a state resource agency shall issue authorizations in conformity with the enforceable policies of approved district coastal management plans and the statewide standards.

(c) In accordance with AS 46.39, AS 46.40.096(b), and 11 AAC 110.200 - 11 AAC 110.270, a resource agency shall, except as provided in 11 AAC 110.040(c), serve as the coordinating agency for a consistency review and render the consistency determination for a project that

(1) requires one or more authorizations from only that resource agency; and

(2) does not require a federal consistency determination or federal consistency certification.

(d) Except as provided in AS 46.40.096(g), a resource agency may not issue an authorization for an activity that is part of a project that is subject to a consistency review unless the coordinating agency issues a final consistency determination that concurs with the applicant's consistency certification.

(e) Following issuance of a final consistency determination, a resource agency may not include an additional alternative measure on the agency's authorization unless that measure was included in the final consistency determination. Additional stipulations or conditions not necessary to achieve consistency under this chapter may be added under an agency's own statutory or regulatory authority.

(f) Except for a disposal of an interest in state land, if a final consistency determination concurs with the applicant's consistency certification, a resource agency shall issue an authorization necessary for a

project within five days after the resource agency issues or receives the final consistency determination, unless the resource agency considers additional time is necessary to fulfill the resource agency's statutory or regulatory requirements.

(g) If a final consistency determination concurs with the applicant's consistency certification, and after the department issues or receives the final consistency determination, the department will authorize a disposal of an interest in state land at the time and in the manner provided by applicable statutory or regulatory requirements.

(h) If a project requires one or more authorizations from only a single resource agency, the resource agency may incorporate a consistency determination into the resource agency's authorization document for a project if, for the part of the document that is the consistency determination, a consistency review is conducted and the consistency determination is rendered in accordance with AS 46.40 and 11 AAC 110.200 – 11 AAC 110.270.

(i) Notwithstanding having concurred in a final consistency determination for a project, a resource agency may deny approval of an authorization application for the project under that agency's own statutory and regulatory authorities.

While state agencies have the authority to acquire land by eminent domain, existing use management (state regulatory and proprietary) authorities are sufficiently comprehensive and binding that the acquisition by the state of interest in land and water is not necessary for the achievement of the program's management objective. The state's eminent domain authority will be relied upon to assure that uses of state concern are not arbitrarily excluded from coastal areas in municipalities that do not have approved district programs.

Section 3.3: Coastal Resource District Participation in the ACMP

The ACMP relies, in part, on local implementation of the ACMP, subject to administrative review and enforcement by OPMP. Coastal resource districts are the means for that local implementation. The term "coastal resource district" is defined at AS 46.40.210 as

each of the following that contains a portion of the coastal area of the state:

(A) unified municipalities;

(B) organized boroughs of any class that exercise planning and zoning authority;

(C) home rule and first class cities of the unorganized borough or within boroughs that do not exercise planning and zoning authority;

> *(D) second class cities of the unorganized borough, or within boroughs that do not exercise planning and zoning authority, that have established a planning commission, and that, in the opinion of the commissioner of community and economic development, have the capability of preparing and implementing a comprehensive district coastal management plan under AS 46.40.030;*
>
> *(E) coastal resource service areas established and organized under AS 29.03.020 and AS 46.40.110 - 46.40.180.*

The coastal resource districts are an important facet of the ACMP. Coastal resource district participation in the ACMP and development of a coastal district plan by a coastal district are voluntary – there is no requirement that a coastal resource district have an approved coastal district plan. However, there are 35 coastal resource districts formed under the ACMP, 33 of these have approved coastal management plans. Thirty-one coastal districts are within a municipality and four are outside the boundaries of organized government. Those coastal resource districts with approved coastal management plans are:

- Aleutians East Borough
- Aleutians West Coastal Resource Service Area
- Bering Straits Coastal Resource Service Area
- Bristol Bay Borough
- Bristol Bay Coastal Resource Service Area
- Ceñaliulriit Coastal Resource Service Area
- City and Borough of Haines
- City and Borough of Juneau
- City and Borough of Sitka
- City and Borough of Yakutat
- City of Angoon
- City of Bethel
- City of Cordova
- City of Craig
- City of Hoonah
- City of Hydaburg
- City of Kake
- City of Klawock
- City of Nome
- City of Pelican
- City of St. Paul
- City of Skagway
- City of Thorne Bay

- City of Valdez
- City of Whittier
- Kenai Peninsula Borough
- Ketchikan Gateway Borough
- Kodiak Island Borough
- Lake and Peninsula Borough
- Matanuska-Susitna Borough
- Municipality of Anchorage
- North Slope Borough
- Northwest Arctic Borough

For those coastal resource districts that do participate in the ACMP and develop a coastal district plan, AS 46.40.030 establishes the coastal district plan development requirements, as follows:

> *(a) Coastal resource districts shall develop and adopt district coastal management plans in accordance with the provisions of this chapter. The plan adopted by a coastal resource district shall be based upon a municipality's existing comprehensive plan or a new comprehensive resource use plan or comprehensive statement of needs, policies, objectives, and standards governing the use of resources within the coastal area of the district. The plan must meet the statewide standards and district plan criteria adopted under AS 46.40.040 and must include*
>
> *(1) a delineation within the district of the boundaries of the coastal area subject to the district coastal management plan;*
>
> *(2) a statement, list, or definition of the land and water uses and activities subject to the district coastal management plan;*
>
> *(3) a statement of policies to be applied to the land and water uses subject to the district coastal management plan;*
>
> *(4) a description of the uses and activities that will be considered proper and the uses and activities that will be considered improper with respect to the land and water within the coastal area; and*
>
> *(5) a designation of, and the policies that will be applied to the use of, areas within the coastal resource district that merit special attention.*
>
> *(b) In developing enforceable policies in its coastal management plan under (a) of this section, a coastal resource district shall meet the requirements of AS 46.40.070 and shall not duplicate, restate, or incorporate by reference statutes and administrative regulations adopted by state or federal agencies.*

As required under AS 46.40.040, the state has adopted regulations at 11 AAC 112 and 11 AAC 114 that provide the coastal districts with the guidance

needed to develop their coastal district plans and enforceable policies. AS 46.40.070 and the regulations at 11 AAC 114 establish the requirements for coastal district plan approval by DNR. The approval of a coastal district plan is contingent upon development and compliance with the state standards and plan criteria, as generally summarized at AS 46.40.070(a):

> *The department shall approved a district coastal management plan submitted for review and approval if*
>
> *(1) the district coastal management plan meets the requirements of this chapter and the statewide standards and district plan criteria adopted by the department; and*
>
> *(2) the enforceable policies of the district coastal management plan*
>
> *(A) are clear and concise as to the activities and persons affected by the policies, and the requirements of the policies;*
>
> *(B) use precise, prescriptive, and enforceable language; and*
>
> *(C) do not address a matter regulated or authorized by state or federal law unless the enforceable policies relate specifically to a matter of local concern; for purposes of this subparagraph, "matter of local concern" means a specific coastal use or resource within a defined portion of the district's coastal zone, that is*
>
> *(i) demonstrated as sensitive to development;*
>
> *(ii) not adequately addressed by state or federal law; and*
>
> *(iii) of unique concern to the coastal resource district as demonstrated by local usage or scientific evidence.*

The ACMP includes at 11 AAC 114 the procedure whereby it reviews and approves the coastal district plan's compliance with the state standards and criteria. The review and approval process described in 11 AAC 114, and specifically sections 11 AAC 114.010 and 11 AAC 114.300–360, includes substantial public (including Federal agency) comment and involvement opportunities through meetings, hearings, and document review and comment periods (see specifically 11 AAC 114.300(a), 11 AAC 114.305(a) – (c), 11 AAC 114.310(d) – (f), 11 AAC 114.315, 11 AAC 114.320(d), 11 AAC 114.325, 11 AAC 114.330(g), 11 AAC 114.340(c) – (g), 11 AAC 114.345(c) – (h), 11 AAC 114.355, 11 AAC 114.360(a)). In addition, the coastal district plan elements described at 11 AAC 114.200 – 11 AAC 114.290 and the review process for approval of a coastal district plan under 11 AAC 114.300 – 11 AAC 114.360 provide the state with the required review of the coastal district's adequate consideration of facilities in which there is a national interest.

Once a coastal district plan has been approved by DNR, that plan becomes an integral part of the ACMP, as the enforceable policies of that plan become enforceable as a matter of state law.

Implementation of a coastal district plan is addressed under AS 46.40.090, which reads:

> *(a) A district coastal management plan approved under this chapter for a coastal resource district that does not have and exercise zoning or other controls on the use of resources within the coastal area shall be implemented by appropriate state agencies as provided in AS 46.40.096. Implementation shall be in accordance with the comprehensive use plan or the statement of needs, policies, objectives, and standards adopted by the district.*
>
> *(b) A coastal resource district that has and exercises zoning or other controls on the use of resources within the coastal area shall implement its district coastal management plan. Implementation shall be in accordance with the comprehensive use plan or the statement of needs, policies, objectives, and standards adopted by the district.*

A coastal district plan that is approved by DNR for a coastal resource service area (an area formed as a coastal district but lacking zoning or other controls over its coastal resources) must be implemented by the state agencies. For these areas, management of uses will continue to take the form of direct state regulation.

A coastal district plan that is approved by DNR for a district that has and exercises zoning or other controls must be implemented by the district. In addition, the state agencies are similarly obligated to implement the coastal district plan, as required at 11 AAC 112.020(b), which reads:

> *Nothing in this chapter or in any district plan displaces or diminishes the authority of any state agency or local government with respect to resources in the coastal area. However, in accordance with 11 AAC 110,*
>
> *(1) uses and activities conducted by state agencies in the coastal area must be consistent with the applicable enforceable policies of an approved district coastal management plan and the standards contained in this chapter; and*
>
> *(2) in authorizing uses or activities in the coastal area under the state resource agency's statutory authority, each state resource agency shall grant authorization if, in addition to finding that the use or activity complies with the agency's statutes and regulations, the coordinating agency finds that the use or activity is consistent with the applicable enforceable policies of an*

approved district coastal management plan and the standards contained in this chapter.

Compliance and enforcement of coastal district plans is addressed under AS 46.40.100. That section also addresses the monitoring system used to determine patterns of non-compliance and non-implementation of a coastal district plan, and the conflict resolution procedure for these issues.

(a) As provided in AS 46.40.090 and 46.40.096, municipalities and state resource agencies shall administer land and water use regulations or controls in conformity with district coastal management plans approved under this chapter and in effect.

(b) A party that is authorized under (g) of this section may file a petition showing that a district coastal management plan is not being implemented. A petition filed under this subsection may not seek review of a proposed or final consistency determination regarding a specific project. On receipt of a petition, the department, after giving public notice in the manner required by (f) of this section, shall convene a hearing to consider the matter. A hearing called under this subsection shall be held in accordance with regulations adopted under this chapter. After hearing, the department may order that the coastal resource district or a state resource agency take any action with respect to future implementation of the district coastal management plan that the department considers necessary, except that the department may not order that the coastal resource district or a state agency take any action with respect to a proposed or final consistency determination that has been issued.

(c) In determining whether an approved district coastal management plan is being implemented by a coastal resource district that exercises zoning authority or controls on the use of resources within the coastal area or by a state resource agency, the department shall find in favor of the district or the state resource agency, unless the department finds a pattern of nonimplementation.

…

(e) The superior courts of the state have jurisdiction to enforce lawful orders of the department under this chapter.

(f) Upon receipt of a petition under (b) of this section, the department shall give notice of the hearing at least 10 days before the scheduled date of the hearing. The notice must

(1) contain sufficient information in commonly understood terms to inform the public of the nature of the petition; and

(2) indicate the manner in which the public may comment on the petition.

(g) The opportunity to petition is limited to

(1) a coastal resource district;
(2) a citizen of the coastal resource district; or
(3) a state resource agency.

(h) If the department finds a pattern of nonimplementation under (c) of this section, the department may order a coastal resource district or a state resource agency to take action with respect to future implementation of the district coastal management plan that the department considers necessary to implement the district coastal management plan. The department's determination under (c) of this section and any order issued under this subsection shall be considered a final administrative order for purposes of judicial review under AS 44.62.560.

In addition, 11 AAC 114.370 provides the process for bringing and hearing a petition for amendment to an approved district plan regarding uses of state concern. The process for submitting a petition regarding non-implementation of a coastal district plan and the general hearing procedure on those petitions is addressed at 11 AAC 114.375–380, respectively.

11 AAC 114.365 also requires that coastal districts submit to DNR an annual progress report on the district plan, a request for reapproval of the district plan every 10 years, and provides DNR with the authority to require a district amend the district plan to resolve certain problems:

(a) After a district plan or amendment takes effect under 11 AAC 114.360(c), the district shall submit annually to the office a brief progress report concerning plan implementation during the state fiscal year. The district shall submit the report by August 15, after the state fiscal year for which the report is made ends. The report must include
(1) a statement describing the district's progress in fulfilling a condition that the commissioner placed upon approval of the district plan or an amendment;
(2) a summary, on a form provided by the office, of significant district land and water use decisions, enforcement actions, activities, and accomplishments in the district during the state fiscal year;
(3) a description of each minor amendment adopted into the district plan during the year;
(4) the district's response to any request made by the office for plan amendments or implementation; and
(5) identification of any problems encountered in implementing the district plan, and a recommendation for solving each problem.

(b) Subject to (c) of this section, the district shall review and submit the district's coastal management plan to the office for reapproval every 10 years after the plan first takes effect under 11 AAC 114.360(c). The submittal shall include an evaluation of the plan effectiveness and implementation, a presentation of any new issues, and a recommendation for resolving any problems that have arisen.

(c) Approval of a significant amendment to a district plan under 11 AAC 114.335 or 11 AAC 114.345 begins a new 10 year period before the district must review and submit the district plan for reapproval under AS 46.40.050(a).

(d) The office may at any time require a district to amend the district plan to resolve a problem with implementing the district plan, or to update part of the district plan that is outdated, if the amendment is necessary to conform to the provisions of AS 46.40 and this chapter.

Each of the coastal districts has an ACMP coordinator responsible for developing, maintaining, and implementing the coastal resource district plan within the framework of the ACMP.

Section 3.4: Ongoing Coordination of the ACMP

The ACMP relies on six basic mechanisms for continuing consultation and coordination with coastal districts, state agencies, and other regional and areawide agencies for carrying out the purposes of the CZMA and the ACMP. These six mechanisms are:

1. Policy-level decision-making from the DNR Commissioner's Office, with coordination and consultation with other state agency commissioners. AS 46.39 provides that the ACMP is to be managed by DNR. DNR adopts the ACMP regulations, develops the grant applications for federal funding to support the ACMP, reviews and approves coastal district plans, and provides the general leadership for the ACMP.

2. Implementation and enforcement in the course of existing permit or program activities of the ACMP statutes and regulations, and the coastal district plans. The ACMP statutes and regulations require that state agencies operate their programs and permitting systems in a manner consistent with the ACMP.

3. Generation and dissemination of information on coastal resources and activities. For many years, OPMP has maintained, and will continue

to maintain, an ACMP web page. This site is presently located at www.alaskacoast.state.ak.us, and OPMP intends to maintain that same web address into the foreseeable future. This website, familiar to ACMP participants, is a key tool in sharing information on coastal resources and activities. As information relevant or valuable to other ACMP network participants is generated, OPMP ensures the information is posted and available through the ACMP web page. In addition to the web page, OPMP assumes a leadership role in generating discussion and bringing experts to the table on issues relating to the management of coastal resources and activities.

4. Operations of the state agency working group, consisting of representatives from the various participating state agencies and offices. The state agency working group has existed since the early years of the ACMP development. The group will continue to exist, though more informally than in the past, and will continue to help develop and implement the ACMP and training/education products for line agency staff members. OPMP convenes and will utilize the ACMP Work Group (ACMP WG) to accomplish its tasks and ensure uniform implementation and information sharing amongst the state agency participants. The ACMP WG is generally composed of each of the following agencies and offices:

   - Office of Project Management and Permitting, DNR
   - Department of Commerce, Community, and Economic Development
   - Department of Environmental Conservation
   - Department of Fish and Game
   - Department of Law
   - Department of Transportation and Public Facilities

   Similarly, OPMP coordinates internally with the DNR divisions (Office of Habitat Management and Permitting, Division of Agriculture, Division of Mining, Land, and Water, Division of Forestry, Division of Geological and Geophysical Surveys, Division of Parks and Outdoor Recreation, and Division of Oil and Gas) to achieve consensus on departmental issues and policies. Depending on the resource issue under discussion, DNR agencies may participate in various ACMP WG meetings.

   The members of the ACMP WG will work to resolve interagency disagreements; advise their respective commissioners of ACMP

viewpoints and policy; serve as official conduit for agency discussions on grant applications and work programs; act as the ACMP liaisons for their respective agencies or offices; assure dissemination of pertinent ACMP information throughout their agencies or offices; assure coordinated and timely delivery of agency assistance to the districts; and manage the contract between OPMP and the agency or office. The ACMP WG consists of two OPMP staff, and the ACMP coordinator for each of the above-listed state agencies in the ACMP network.

Coastal district representatives participate voluntarily in the ACMP WG to address coastal issues of interest that affect local implementation.

5. The enhancement grants program [16 U.S.C. 1456(b) "Section 309"] administered by OPMP provides an important opportunity for collaboration and outreach to all ACMP participants. Through the enhancement grants program, OPMP leads Alaska through an evaluation of the ACMP and identifies priority coastal issues to be addressed through research, improved implementation, and program changes to the ACMP. The national topics of concern addressed through the enhancement grants program include coastal hazards, coastal wetlands, cumulative and secondary impacts, energy resources and facilities, marine aquaculture, marine debris, ocean resources, public access, and special area management planning.

6. Coastal Nonpoint Source Pollution Control Program [16 U.S.C. 1455(b) Section "6217"]. The ACMP has collaborated with the Department of Environmental Conservation and other state agencies to address coastal nonpoint source pollution through a marriage of the CZMA Section 6217 and CWA Section 319 nonpoint pollution programs. The program provides additional means to address important resource management issues. Recent examples of this collaborative program include management guidelines and programs for onsite sewage disposal systems and urban run-off from local roads and bridges. This program provides an opportunity beyond the consistency review process for ACMP participants to find creative solutions to air, land, and water quality challenges.

The Office of Project Management and Permitting within DNR has the responsibility of coordinating all four of these mechanisms for consultation and coordination. Many of these activities are carried out via contracts for services

between OPMP and the servicing agency. OPMP is responsible for all financial matters relevant to the ACMP, except that the Department of Commerce, Community and Economic Development is responsible for receiving funds from OPMP and passing them through to the coastal districts. All contracts are reviewed by OPMP and approved before they may be signed and begin.

OPMP is also given the responsibility for substantive coordination of the ACMP. OPMP is to monitor all state and federal coastal activity and is the designated agency for federal consistency. If OPMP should find that a state agency or coastal district is not correctly implementing the ACMP, it will initially seek resolution through informal means. If this fails, OPMP will request that the DNR Commissioner or the Governor resolve the matter.

In addition to the four basic mechanisms described above, the open nature of state proceedings under the Administrative Procedures Act at AS 44.62, the consistency review process of 11 AAC 110, and the district planning process at 11 AAC 114 provide additional consultation and coordination requirements between OPMP and other agencies within the coastal zone to assure the full participation of those local governments and agencies in carrying out the purposes of the ACMP.

The original program approval process included an in-depth coordination with the required agencies and their existing plans. Over the past 25 years as the program has been implemented, the day-to-day permit and consistency review process and the district planning, revision and amendment process require that the ACMP program interact with participating local, area wide and federal agencies on a regular basis. Through the program's networked approach, each participating or commenting body reviews the proposed projects and district plans against existing local, state, regional and federal planning documents in place and effective during the particular review period. This networked consultation process with existing plans was in place on January 1, and did not change as a result of the revised regulations. The networked and participating agencies were invited to comment on any impacts the proposed regulations might have with existing planning documents through the formal public notice and comment process.

Chapter 4: Subject Uses of the ACMP

Section 4.1: Subject Uses of the ACMP

The ACMP has evaluated and identified those uses and activities in the coastal zone which may affect coastal lands and waters. Only those uses or activities found to have potential impact on coastal lands or waters have been made subject to the management program. The ACMP identifies those coastal lands and water uses that are subject to the ACMP in several ways.

First, DNR identified nine major uses or activities subject to the ACMP, and for each, promulgated a statewide standard. These statewide standards have the force of law. These nine uses and activities are:

1. Coastal development
2. Natural hazard areas
3. Coastal access
4. Energy facilities
5. Utility routes and facilities
6. Timber harvest and processing
7. Sand and gravel extraction
8. Subsistence
9. Transportation routes and facilities

Second, DNR identified three categories of resources and habitats subject to the ACMP, and for each, promulgated a statewide standard. These state standards have the force of law. These three categories of resources and habitats are:

1. Habitats
2. Air, land, and water quality
3. Historic, prehistoric, and archeological resources

Third, the ACMP requires that "municipalities and state resource agencies shall administer land and water use regulations or controls in conformity with district coastal management plans approved under this chapter and in effect." AS 46.40.100(a). AS 46.40.030(a) additionally requires that each coastal resource district plan include:

> *(2) a statement, list, or definition of the land and water uses and activities subject to the district coastal management program;*
>
> *(3) a statement of policies to be applied to the land and water uses subject to the coastal management plan;*

(4) a description of the uses and activities that will be considered proper and the uses and activities that will be considered improper with respect to land and water within the coastal area; and

(5) a designation of, and the policies that will be applied to the use of, areas within the coastal resource district that merit special attention.

In implementing this statute, 11 AAC 114.250(a) requires each district to "include a description of the land and water uses and activities that are subject to the district plan." However, the uses and activities subject to a district plan are "limited to those included in 11 AAC 112.200 – 11 AAC 112.240, 11 AAC 112.260 – 11 AAC 112.280, and (b) – (i) of this section." Thus, the land and water uses and activities that may be addressed by a coastal district plan and subject to that plan are:

1. coastal development
2. natural hazard areas
3. coastal access
4. energy facilities
5. utility routes and facilities
6. sand and gravel extraction
7. subsistence
8. transportation routes and facilities
9. recreation
10. tourism
11. commercial fishing and seafood processing facilities
12. important habitat
13. history or prehistory sites

Fourth, DNR identified the applicability of the ACMP to those uses or activities that are subject to the consistency review process of 11 AAC 110. Those requirements, identified at 11 AAC 110.010(b), include any activity of a project that

(1) requires a

(A) resource agency authorization;

(B) federal consistency determination from a federal agency in accordance with 16 U.S.C. 1456(c)(1) and (2) (Coastal Zone Management Act) and 15 C.F.R. 930.36-930.40; or

(C) federal consistency certification, in accordance with

(i) 16 U.S.C. 1456(c)(3)(A) (Coastal Zone Management Act) and 15 C.F.R. 930.57-930.58; or

(ii) 16 U.S.C. 1456(c)(3)(B) (Coastal Zone Management Act) and 15 C.F.R. 930.76, from a person who submits an OCS plan to the United States Secretary of the Interior; and

(2) is located

(A) within the coastal zone; or

(B) in an area described in AS 46.40.096(l)(2) that is subject to a consistency determination under 15 C.F.R. Part 930.

The ACMP has developed and maintains "a list of resource agency authorizations that authorize activities that may have a reasonably foreseeable direct or indirect effect on a coastal use or resource." 11 AAC 110.750(a). That list, set out in Volume I of the "C List," includes the following state resource agency authorizations:

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

- Permit to apply pesticides to waters of the state, aerial application on public or private land, and right-of-way applications for pesticide use which fall under the purview of the DEC permit to apply pesticides. (AS 46.03.320, 18 AAC 15, 18 AAC 90.500, 18 AAC 90.505).
- Transfer, storage, and disposal (TSD) Resource Conservation and Recovery Act (RCRA) Hazardous Waste. (AS 46.03.302, 18 AAC 63).
- Air quality control construction permit that approves air emissions. (AS 46.14.120, AS 46.14.130, 18 AAC 15, 18 AAC 50).
- Air quality control operating permit that approves air emissions. (AS 46.14.120, AS 46.14.130, 18 AAC 15, 18 AAC 50).
- Solid waste disposal permit. (AS 46.03.020, AS 46.03.100, AS 46.03.110, AS 46.03.120, 18 AAC 15, 18 AAC 60).
- Reclassification of state waters. (AS 46.03.020, 18 AAC 15, 18 AAC 70.230).
- Waste disposal permit (wastewater discharge). (AS 46.03.020, AS 46.03.100 & 110, AS 46.03.120 & 710, 18 AAC 15, 18 AAC 70, 18 AAC 72).
- 401 Certification-Certificate of Reasonable Assurance Section 401. (AS 46.03.020, 18 AAC 15, 18 AAC 70, 18 AAC 72).
- Oil discharge contingency plans for offshore facilities and onshore fuel storage facilities with a capacity of 10,000 barrels or greater. (AS 46.04.030, AS 46.04.050, 18 AAC 75.400 – 496).
- Oil discharge contingency plans for oil tankers and oil barges. (AS 46.04.030, 18 AAC 75.400 – 496).

DEPARTMENT OF FISH AND GAME

- Permit to operate a clam dredge. (5 AAC 38.050).
- Aquatic farm and hatchery permit. (AS 16.40.100, 5 AAC 41).
- Special Area Permit. (AS 16.20, 5 AAC 95).
- Hatchery permit (Private Non-Profit). (AS 16.10.400 – 430).

DEPARTMENT OF NATURAL RESOURCES
Division of Agriculture

- Lease of cleared or drained agricultural land. (AS 38.07).
- Disposal of agricultural interest. (AS 38.05.321, 11 AAC 67.167 – 188).
- Approval of application for clearing or draining of agricultural land in vicinity of state land. (AS 38.07.030).

Division of Forestry

- State timber sale and personal use contract of more than 10 acres in the spruce-hemlock coastal forests (OPMP Southeastern region and Prince William Sound) and more than 40 acres in interior forests south of the Alaska Range (OPMP Southcentral region excluding Prince William Sound), and any timber sale which includes timber lands within 90 meters from anadromous and high value resident fish waters. State timber sale and personal use contract of more than 160 acres north of the Alaska Range (OPMP northern region), and any timber sale that includes timber lands within 30 meters of anadromous and high value resident fish waters. Negotiated Timber Sales to Local Manufacturers. (AS 38.05.110, AS 38.05.118, AS 38.05.120, AS 38.05.123, 11 AAC 71).
- Log salvage sales. (AS 38.05.110, AS 38.05.118, AS 38.05.120, 11 AAC 71.400 – 430).

Division of Mining, Land and Water

- Aquatic farming and hatchery lease. (AS 38.05.083, 11 AAC 63).
- Coal lease sales. (AS 38.05.150, 11 AAC 85).
- Coal prospecting permit. (AS 38.05.145, AS 38.05.150(c), 11 AAC 85.110).
- Disposal of land by auction or lottery. (AS 38.05.050 – 057, 11 AAC 67).
- Grazing lease. (AS 38.05.070, AS 38.05.075, 11 AAC 60).
- Homestead Disposal. (AS 38.09, 11 AAC 67.138 – 155).
- Lease, sale, grant, or other disposal. (AS 38.05.070-075, 11 AAC 58, 11 AAC 60).
- Lease of Tidelands. (AS 38.05.070-075, 11 AAC 62).
- Material Sales, except sales from approved upland sources and personal use contracts. (AS 38.05.110 – 120, 11 AAC 71).

- Offshore mining lease and sale. (AS 38.05.145, AS 38.05.250, 11 AAC 86.530 – 580).
- Offshore mining prospecting permit. (AS 38.05.250(a), 11 AAC 86.500 – 535).
- Oil and natural gas pipeline right-of-way leasing. (AS 38.35, 11 AAC 80.005 – 055).
- Phosphate lease. (AS 38.05.145, AS 38.05.155, 11 AAC 84.200).
- Potassium compound prospecting permit and lease. (AS 38.05.145, AS 38.05.175, 11 AAC 84.600).
- Right of way or easement permit for roads, trails, ditches, pipelines, drill sites, log storage, telephone or transmission lines, outfall lines, or access corridors. (AS 38.05.850, 11 AAC 51).
- Sodium compound prospecting permit and lease. (AS 38.05.145, AS 38.05.165, 11 AAC 84.400).
- Sulphur prospecting permit and lease. (AS 38.05.145, AS 38.05.170, 11 AAC 84.500).
- Tideland Conveyance. (AS 38.05.820, AS 38.05.821, AS 38.05.825, 11 AAC 62).
- Upland mining lease. (AS 38.05.185, AS 38.05.205, 11 AAC 86.300 – 350).
- Water use permit. (AS 46.15, 11 AAC 93).
- Approvals subject to the Alaska Surface Coal Mining Control and Reclamation Act (SMCRA), other than Notices of Intent to Explore. (AS 27.21.030, AS 27.21.060, 11 AAC 90.001).
- General land use permits, except for those classified as categorically consistent (A List) or generally consistent (B List) approvals. (AS 38.05.850).
- Miscellaneous land use permit for mining activity or mineral exploration. (AS 38.05.020, AS 38.05.035, AS 38.05.850, 11 AAC 96).
- Mining reclamation plan approval. (AS 27.19, 11 AAC 97).
- Approval of plan of operations or plan of development on leased lands (Deadline does not apply when the plan is included in the lease at the time of the sale). (AS 38.05.035, AS 38.05.070 – 075, 11 AAC 62.700).
- Plans of operations on leased lands or land subject to an offshore prospecting permit. (AS 38.05.020, AS 38.05.035, 11 AAC 96).
- Material mining reclamation plan approvals. (AS 27.19, 11 AAC 97).
- Temporary water use permits for water withdrawals, except for withdrawals from sources classified as categorically consistent or generally consistent approvals. (AS 46.15.155, 11 AAC 93).

- Tideland use permit. (AS 38.05.850, 11 AAC 96).

Division of Oil and Gas

- Oil and gas licenses and leases. (AS 38.05.131 – 134, AS 38.05.135, AS 38.05.145, AS 38.05.180, 11 AAC 83).
- Geothermal lease sales. (AS 38.05.145, AS 38.05.181, 11 AAC 84.700 – 790).
- Oil shale lease. (AS 38.05.145, 11 AAC 84.300).
- Application to drill geothermal wells. (AS 41.06.050).
- Plan of operations on lease lands. (AS 38.05.135, AS 38.05.145, AS 38.05.180, 11 AAC 83.158).
- Geophysical exploration permit. (AS 38.05.020, AS 38.05.035, AS 38.05.180, 11 AAC 96).
- Geothermal prospecting permit. (AS 38.05.145, AS 38.05.181(g), 11 AAC 84.700 – 790).

Office of Habitat Management and Permitting

- Fish habitat permit. (AS 41.14.840, AS 41.14.870).

Division of Parks and Outdoor Recreation

- Authorization to construct structure in state parks. (AS 41.21.020, 11 AAC 12.140, 11 AAC 18.010).
- Authorization to use explosives in state parks. (AS 41.21.020, 11 AAC 12.195, 11 AAC 18.010).
- Permit for access across state parks. (AS 41.21.024, 11 AAC 18.010).
- Special use permit. (AS 41.21.020, 11 AAC 18.010).
- Archaeological Permit for the excavation of historic or archeological resources. (AS 41.35.080, 11 AAC 16.030 – 080).

The ACMP has also developed and maintains a list of federal licenses and permit activities which may affect any coastal use or resource, including reasonably foreseeable effects. That list, set out in 11 AAC 110.400(b), includes the following federal authorizations:

- A United States Department of Agriculture, United States Forest Service permit required under 36 C.F.R. Part 251 for outfitter and guide operations; for mining plans of operation required under 36 C.F.R. 228.4 - 228.8; required under 36 C.F.R. 228.58 - 228.61 for mineral material sales and sites; required under 36 C.F.R. Part 251 for a hotel, a motel, a resort, a service station, a fish hatchery, mariculture, a liquid waste disposal area, a sewage transmission line, hydroelectric projects, oil and gas pipelines, an airport, a heliport, a dam, a reservoir, water transmission, a fish ladder, power lines, telephone lines, or a water easement, or for ground disturbing

construction that requires an EA or EIS under NEPA, an EPA Clean Water Act permit, an Army Corps of Engineers permit under 33 U.S.C. 1344, a DEC authorization under 18 AAC 50, 18 AAC 60, 18 AAC 70, or 18 AAC 72, a Fish and Game authorization under AS 16 or AS 41.14, or a DNR water rights or tidelands authorization under AS 46.15.010 - 46.15.160 and 11 AAC 93.040 - 11 AAC 93.130.

- A United States Secretary of Commerce permit under 33 U.S.C. 1441, for activities in a national marine sanctuary.
- A United States Department of Defense, Army Corps of Engineers permit under 33 U.S.C. 401 and 403 (Rivers and Harbors Act), under 43 U.S.C. 1333 (Outer Continental Shelf Lands Act), under 33 U.S.C. 1413 (Marine Protection Research and Sanctuaries Act), authorizing ocean dumping outside the limits of the territorial sea; or under 33 U.S.C. 1344 (Clean Water Act).
- A United States Department of Energy, Federal Energy Regulatory Commission license under 16 U.S.C. 797(e) and 16 U.S.C. 808 (Federal Power Act), order for interconnection of electric transmission facilities under 16 U.S.C. 824a(b) (Federal Power Act), permission under 15 U.S.C. 717f(b) or (c) (Natural Gas Act); certificate of public convenience and necessity for the construction and operation of natural gas pipeline facilities under 15 U.S.C. 717(c).
- A United States Environmental Protection Agency permit under 33 U.S.C. 1342 or 1345 (Clean Water Act), or a permit under 40 C.F.R. 60.14, 63, 64.2 or 42 U.S.C. 7412 (Clean Air Act).
- A United States Department of the Interior, BLM permit/lease 43 C.F.R. Part 2920, 2800.0-1 -2808.6, or 43 C.F.R. 2800.0-1 - 2808.6, a MMS OCS plan; a FWS right-of-way permit under 50 C.F.R. 29 and 50 C.F.R. 36; a National Park Service right-of-way permit under 36 C.F.R. 14.
- A United States Nuclear Regulatory Commission permit and license for the siting of nuclear facilities under 10 C.F.R. Part 52, construction of nuclear facilities under 10 C.F.R. Part 52, or operation of nuclear facilities under 10 C.F.R. Parts 52 – 55.
- A United States Department of Homeland Security, United States Coast Guard permit under 33 U.S.C. 401 or 402 (Rivers and Harbors Act) and 33 C.F.R. Parts 114-117, 33 U.S.C. 1501 – 1524.

In accordance with 16 U.S.C. 1456(c)(1) and (2), the ACMP reviews all federal consistency determinations for each federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone.

Activities that are subject to the consistency review process of 11 AAC 110 must be found consistent with the state enforceable policies (11 AAC 112) and applicable coastal district enforceable policies. If found inconsistent with either, the coordinating agency will make a finding that the project is not consistent with ACMP, and the use or activity will be denied. As well, 11 AAC 112.020(b)(2) states that "in authorizing uses or activities in the coastal area under the state resource agency's statutory authority, each state resource agency shall grant authorization if, in addition to finding that the use or activity complies with the agency's statutes and regulations, the coordinating agency finds that the use or activity is consistent with the applicable enforceable policies of an approved district coastal management plan and the standards contained in this chapter."

In Alaska, no uses have been prohibited within the coastal area, other than authorized district enforceable policies that prohibit specific activities, or all activities, in duly designated areas under 11 AAC 114.270(g). However, the management authorities included in the ACMP may impose additional constraints on the types of activities permitted and the specific conditions under which such uses are allowed, or restrict or exclude such uses or activities if they are not found consistent with the enforceable policies of the ACMP.

Section 4.2: Subject Uses of Regional Benefit

The process for identifying coastal dependent uses and activities are provided for primarily through the coastal district plan provisions within 11 AAC 114, whereas the orderly process for evaluating the uses and activities is through the application of the state's Coastal Development standard at 11 AAC 112.200, Energy Facilities standard (11 AAC 230), and Coastal Access standard (112.220).

The procedures for developing, reviewing, and approving coastal district plan provisions are included at 11 AAC 114. As part of that procedure, the ACMP requires districts to submit a description of the uses and activities in their plans, including uses of state concern, which are proper or improper within their coastal area. 11 AAC 114.260. In determining which uses would be improper, the ACMP prohibits districts from "arbitrarily or unreasonably" restricting or excluding a use of state concern. 11 AAC 114.270(e)(4).

"Uses of state concern" are defined at AS 46.40.210(12) as "those land and water uses that would significantly affect the long-term public interest." Uses of state concern are defined to include:

> *(A) uses of national interest, including the use of resources for the siting of ports and major facilities that contribute to meeting national energy*

needs, construction and maintenance of navigational facilities and systems, resource development of federal land, and national defense and related security facilities that are dependent upon coastal locations;

(B) uses of more than local concern, including those land and water uses that confer significant environmental, social, cultural, or economic benefits or burdens beyond a single coastal resource district;

(C) the siting of major energy facilities, activities pursuant to a state or federal oil and gas lease, or large-scale industrial or commercial development activities that are dependent on a coastal location and that, because of their magnitude or the magnitude of their effect on the economy of the state or the surrounding area, are reasonably likely to present issues of more than local significance;

(D) facilities serving statewide or interregional transportation and communication needs; and

(E) uses in areas established as state parks or recreational areas under AS 41.21 or as state game refuges, game sanctuaries, or critical habitat areas under AS 16.20.

Obviously, the definition encompasses both uses in which there may be national interests, as well as uses of greater than local concern. The definition includes those uses involving the planning and siting of facilities in which there may be a national interest, and also uses of regional benefit. Further, the definition clearly suggests uses of some magnitude or broad need are uses of state concern.

A state agency or other interested person may submit a petition for amendment to an approved district plan if there is substantial evidence that a use of state concern is arbitrarily or unreasonably restricted or excluded by the district plan. 11 AAC 114.370(a). The petitioner must identify the use of state concern that is arbitrarily or unreasonably restricted or excluded by implementation of the district plan and document how the use of state concern is being arbitrarily or unreasonably restricted or excluded. 11 AAC 114.370(b). Following review, mediation, and an opportunity to resolve the differences in accordance with the procedures set forth in the Alaska Administrative Procedure Act, should the commissioner continue to find that the district plan has arbitrarily or unreasonably restricted or excluded the disputed use, the commissioner may order that the district plan be revised to accommodate the disputed use of state concern. AS 46.40.060.

In developing their coastal plans, some districts may encounter one or more proposed uses of state concern competing for the same area or locality within the district's coastal zone. The issue is easily resolved when reasonable alternative sitings are available for the competing uses; however, it becomes critical should two or more competing proposals lack such alternatives. The question then arises as to

how the district would resolve the conflict in favor of one use of state concern without arbitrarily or unreasonably excluding other possible uses of state concern.

As noted above, to avoid an arbitrary or unreasonable restriction or exclusion of a use of state concern, districts are required to (1) consult with and consider the views of appropriate federal, state or regional agencies, as well as (2) base their restriction or exclusion on the availability of reasonable alternative sites.

Districts are required to gather information relevant to competing alternatives. That information is then used in a balancing process to determine which alternative should prevail. Accordingly, districts must actively consult with, and consider the views of appropriate federal, state or regional agencies regarding competing uses of state concern. From these consultations the districts must document the relevant factors for and against each of the competing uses of state concern, and use those factors in a deliberative balancing process. That balancing process would consist of considering and weighing competing factors to determine which use of state concern should prevail to the exclusion of another.

The documentation need not appear in the district's plan document, but should be available for review. The district's decision as to which use of state concern should be restricted or excluded will be reviewed to determine whether the district's action was arbitrary or unreasonable.

Following plan approval by DNR, districts may encounter difficulty in applying their district enforceable policies to uses of state concern. That difficulty would involve uses of state concern which were not anticipated during the process of plan development and approval. Consequently, it is possible that a district could find itself, after plan approval and adoption, faced with the issue of exclusion or restriction of a use of state concern that it did not address in its district plan.

If this occurs, a solution would be found in the district plan amendment. An amendment would be mandatory if a district elected to exclude or restrict a newly discovered use of state concern. The amendment process would follow the initial plan approval procedure. The district would first comply with the ACMP guidelines in describing whether and on what basis the use of state concern would be considered proper or improper within the district's coastal zone. The amendment would then be submitted to OPMP for its approval, and OPMP would be guided by the statutory standard regarding arbitrary and unreasonable restriction or exclusion of uses of state concern in determining whether the amendment would be approved. Approval of the amendment by OPMP would be required as the amendment would be a significant one. Its significance would lie in the high

priority placed by the ACMA on uses of state concern. The amendment would take final effect upon approval by DNR.

Local ordinances may not interfere with the operation of statutes. Municipality of Anchorage v. Repasky, 34 P.3d 302 (Alaska 2001), citing Jefferson v. State, 527 P.2d 37 (Alaska 1974). The uses of state concern most often mentioned as possible targets of unreasonable restriction or exclusion -- those relating to the extraction of oil, gas, and coal -- are subject to regulation under state and federal statutes. Any local restriction or and exclusion of such uses would be stricken. Similarly, electric power, transportation, and communication facilities are extensively regulated by state and federal statutes. Unreasonable restriction or exclusion of such facilities by local ordinance would likewise be impermissible under state law.

11 AAC 110.010(b) identifies those projects, or activities thereof, that are subject to the consistency review process of the ACMP. The orderly process for evaluating projects, including major facilities, is the consistency review process described at 11 AAC 110. Activities of the project that are subject to the consistency review process of 11 AAC 110 must be found consistent with the ACMP enforceable policies, including the state Coastal Dependent standard at 11 AAC 112.200. That standard sets out the prioritization for coastal dependent uses, including those land and water uses of regional use. The standard reads, in part,

> *(a) In planning for and approving development in or adjacent to coastal waters, districts and state agencies shall manage coastal land and water uses in such a manner that those uses that are economically or physically dependent on a coastal location are given higher priority when compared to uses that do not economically or physically require a coastal location.*
>
> *(b) Districts and state agencies shall give, in the following order, priority to*
>
> *(1) water dependent uses and activities;*
>
> *(2) water related uses and activities; and*
>
> *(3) uses and activities that are neither water dependent nor water related for which there is no practicable inland alternative to meet the public need for the use or activity.*

Chapter 5: ACMP Authorities, Standards and Enforceable Policies

The legal basis of the ACMP is AS 46.39.010. That statute authorizes DNR to render, on behalf of the state, "all federal consistency determinations and certifications authorized by [the CZMA], and each conclusive state consistency determination when a project requires a permit, lease, or authorization from two or more state resource agencies."

This chapter describes the enforceable policies of the ACMP. There are three categories of enforceable policies of the ACMP: (1) state resource agency authorities; (2) state standards at 11 AAC 112; and (3) coastal district enforceable policies developed and approved under 11 AAC 114.

Section 5.1: The State Resource Agencies

Specific to the consistency review process described in 11 AAC 110, the state resource agencies (the departments of Environmental Conservation, Fish and Game, and Natural Resources), and the various divisions of DNR that participate in the consistency review process, are delineated separately below, along with their respective authorities and responsibilities.

Though the listing below is specific to each agency or division, the participation of each resource agency in an ACMP consistency review is governed by the following regulatory parameters:

> ***11 AAC 110.050. State agency authority and responsibility.*** *(a) Nothing in this chapter displaces or diminishes the authority of a state agency with respect to coastal uses and resources under that agency's own statutory and regulatory authorities.*
>
> *(b) As provided in this chapter, a state resource agency shall issue authorizations in conformity with the enforceable policies of approved district coastal management plans and the statewide standards.*
>
> *(c) In accordance with AS 46.39, AS 46.40.096(b), and 11 AAC 110.200 - 11 AAC 110.270, a resource agency shall, except as provided in 11 AAC 110.040(c), serve as the coordinating agency for a consistency review and render the consistency determination for a project that*
>
> *(1) requires one or more authorizations from only that resource agency; and*
>
> *(2) does not require a federal consistency determination or federal consistency certification.*
>
> *(d) Except as provided in AS 46.40.096(g), a resource agency may not issue an authorization for an activity that is part of a project that is*

subject to a consistency review unless the coordinating agency issues a final consistency determination that concurs with the applicant's consistency certification.

(e) Following issuance of a final consistency determination, a resource agency may not include an additional alternative measure on the agency's authorization unless that measure was included in the final consistency determination. Additional stipulations or conditions not necessary to achieve consistency under this chapter may be added under an agency's own statutory or regulatory authority.

(f) Except for a disposal of an interest in state land, if a final consistency determination concurs with the applicant's consistency certification, a resource agency shall issue an authorization necessary for a project within five days after the resource agency issues or receives the final consistency determination, unless the resource agency considers additional time is necessary to fulfill the resource agency's statutory or regulatory requirements.

(g) If a final consistency determination concurs with the applicant's consistency certification, and after the department issues or receives the final consistency determination, the department will authorize a disposal of an interest in state land at the time and in the manner provided by applicable statutory or regulatory requirements.

(h) If a project requires one or more authorizations from only a single resource agency, the resource agency may incorporate a consistency determination into the resource agency's authorization document for a project if, for the part of the document that is the consistency determination, a consistency review is conducted and the consistency determination is rendered in accordance with AS 46.40 and 11 AAC 110.200 – 11 AAC 110.270.

(i) Notwithstanding having concurred in a final consistency determination for a project, a resource agency may deny approval of an authorization application for the project under that agency's own statutory and regulatory authorities.

Subsection 5.1.1: DNR Generally and OPMP

Because DNR's mission statement is broad ("To develop, conserve and enhance natural resources for present and future Alaskans"), the authority and regulatory purview of the department is best understood when looking at the roles and purview of its divisions.

As discussed in Chapter 3, OPMP is the lead agency for the ACMP. While OPMP's role and authority was described in Chapter 3 in general terms, its

statutory duties (as DNR's ACMP management office) are prescribed in AS 46.39.030 and AS 46.39.040, respectively:

> ***Sec. 46.39.030. Powers of the department****. The department may*
>
> *(1) apply for and accept grants, contributions, and appropriations, including application for and acceptance of federal funds that may become available for coastal planning and management;*
>
> *(2) contract for necessary services;*
>
> *(3) consult and cooperate with*
>
> *(A) persons, organizations, and groups, public or private, interested in, affected by, or concerned with coastal area planning and management;*
>
> *(B) agents and officials of the coastal resource districts of the state, and federal and state agencies concerned with or having jurisdiction over coastal planning and management;*
>
> *(4) take any reasonable action necessary to carry out the provisions of this chapter or AS 46.40.*

> ***Sec. 46.39.040. Duties of the department.*** *In conformity with 16 U.S.C. 1451 - 1464 (Coastal Zone Management Act of 1972), as amended, the department shall*
>
> *(1) develop statewide standards for the Alaska coastal management program, and criteria for the preparation and approval of district coastal management plans in accordance with AS 46.40;*
>
> *(2) establish continuing coordination among state agencies to facilitate the development and implementation of the Alaska coastal management program; in carrying out its duties under this paragraph, the department shall initiate an interagency program of comprehensive coastal resource planning for each geographic region of the state;*
>
> *(3) assure continued provision of data and information to coastal resource districts to carry out their planning and management functions under the program.*

These duties are more specifically delineated in regulation. OPMP's duties specific to the consistency review process are described in 11 AAC 110:

> ***11 AAC 110.030. Office of Project management and permitting responsibility.*** *(a) For a consistency review, and in accordance with AS 46.39.010, AS 46.40.096, and*
>
> *(1) 11 AAC 110.200 - 11 AAC 110.270, the office shall serve as the coordinating agency and render the consistency determination for a project that requires an authorization from two or more*

(A) resource agencies; or

(B) divisions or offices within the department;

(2) 11 AAC 110.300 - 11 AAC 110.355, the office shall serve as the coordinating agency and render the consistency response for a project that requires

(A) a federal consistency determination; or

(B) an authorization from one or more resource agencies and a federal consistency determination; or

(3) 11 AAC 110.400 - 11 AAC 110.455, the office shall serve as the coordinating agency and render the consistency response for a project that requires

(A) a federal consistency certification; or

(B) an authorization from one or more resource agencies and a federal consistency certification.

(b) If, in accordance with 16 U.S.C. 1456(c) (Coastal Zone Management Act) and 15 C.F.R. Part 930, a federal consistency determination, consistency certification, or related information is to be submitted to the state agency designated under 16 U.S.C. 1455(d)(6) (Coastal Zone Management Act) and 15 C.F.R. 923.47, that determination, certification, or related information must be submitted to the office.

(c) The office shall develop, maintain, and update a coastal project questionnaire. A coordinating agency shall use the coastal project questionnaire to solicit information regarding the project description, site information, consistency with the enforceable policies of the program, and necessary authorizations.

(d) At the request of a resource agency that is coordinating a consistency review under AS 46.40.096(b) and 11 AAC 110.050(c), the office shall act as a facilitator to attempt to resolve conflicts among the resource agencies, an affected coastal resource district, or an applicant regarding the consistency determination.

(e) For a consistency review under 11 AAC 110.300 – 11 AAC 110.355 or 11 AAC 110.400 – 11 AAC 110.455 that does not require a Department of Environmental Conservation authorization because the activity is either a federal activity or is located on federal land or the outer continental shelf, the office shall, in addition to the office's consistency review under AS 46.40.096, coordinate with the Department of Environmental Conservation and issue that department's finding under AS 46.40.040(b)(2) and 11 AAC 110.010(e) of whether the relevant aspects of the activity satisfy the requirements of AS 46.03, AS 46.04, AS 46.09, or AS 46.14 and the regulations adopted under those statutes, as applicable.

OPMP's duties specific to the authority and administration of the ACMP and oversight of the coastal district management plans are described in 11 AAC 114.020:

> ***11 AAC 114.020. Program management and coordination.*** *(a) The office is the designated lead agency for the program. The office shall*
>
> *(1) present the staff position regarding program matters before the commissioner;*
>
> *(2) coordinate the activities of state agencies participating in the program; and*
>
> *(3) review state and federal actions for consistency with the program, as provided in 11 AAC 110.*
>
> *(b) The office may initiate an interagency program of comprehensive coastal resource management for each geographic coastal region. The purpose of these regional programs is to*
>
> *(1) assist the office and districts in identifying uses of state concern and developing management policies for these uses;*
>
> *(2) provide resource, social, and economic information on a coordinated regional basis; and*
>
> *(3) assist the office and districts to identify existing or potential conflicts and means of resolving those conflicts.*
>
> *(c) Plans and recommendations developed as part of a regional program described in (b) of this section must be transmitted to the district through the office. District planning efforts must demonstrate review and consideration of these plans and recommendations. If the final plan proposed by a district does not agree with the program plans and recommendations for the applicable region, the differences shall be resolved by the office.*
>
> *(d) The office shall prepare a compilation of the statutes and regulations of the program to assist in the development of district plans and state agency programs*.

Subsection 5.1.2: Other DNR Divisions

The regulatory reach of the various DNR divisions are best understood when viewing the mission statements of each. These are set forth below.

DNR Division of Agriculture.

To promote and encourage development of an agriculture industry in the state.

DNR Division of Geological and Geophysical Surveys.

Determine the potential of Alaskan land for production of metals, minerals, fuels, and geothermal resources, the locations and supplies of groundwater and construction material, and the potential geologic hazards to buildings, roads, bridges, and other installations and structures (AS 41.08.020).

DNR Division of Forestry.

To develop, conserve, and enhance Alaska's forests to provide a sustainable supply of forest resources for Alaskans. Note that under 11 AAC 112.250, the Forest Resources and Practices Act (AS 41.17) and the regulations adopted thereunder with respect to the harvest and processing of timber are incorporated into the program and constitute the components of the program with respect to those purposes.

DNR Division of Mining, Land and Water.

The Division of Mining, Land and Water (MLW) manages all state-owned land except for trust property and units of the Alaska State Park System. The mission of the MLW is to provide for the use and protection of Alaska's state owned land and water, with an "aim toward maximum use of our lands and waters consistent with the public interest." MLW manages Alaska's 65 million acres of tidelands, shorelands, and submerged lands, including some 34,000 miles of coastline. Finally, MLW has jurisdiction over all of the state's water resources, equaling about 40% of the entire nation's stock of fresh water. MLW authorizes the following uses of Alaska's lands and waters:

- Mining claims, coal and mineral leases, access, and plans of operation for mineral development;
- Ice roads, support facilities, and exploration camps for oil and gas development;
- Gravel sales for road construction and private development;
- Log-transfer sites, access, and support camps for timber development;
- Leasing set-net sites for commercial fishing and mariculture sites for the shellfish farming industry;
- Lodge sites and access for the tourism industry;
- Access for public and private entities across state lands and waters, including power and telephone lines; and
- Water rights and water use authorizations.
- Offering state land to individual Alaskans and to municipalities, including auction or lottery sales of surveyed lots; remote recreational

cabin sites; and land grants to cities and boroughs as well as public and charitable use conveyances.

- Developing land use plans to guide the use, development, and disposal of state lands.
- Reclaiming abandoned mine land that is a public health and/or safety hazard.

DNR Division of Oil and Gas

The Division of Oil and Gas (O&G) is responsible for the leasing of state lands for oil and gas exploration. The duties of O&G are

- Ensuring that promising oil and gas lands are made available for competitive leasing on a timely and predictable basis, and the state receives full value for the sale of these resources;
- Advancing innovative programs such as exploration licensing and expanded exploration incentive credits that will promote exploration and development on both state and private lands in frontier interior basins;
- Ensuring that all royalty, rental and bonus revenues due the state from leasing and production are received, and that shared federal royalties are properly received and allocated;
- Ensuring that the surface operations of lessees and permittees are conducted in an environmentally, socially, and economically sound manner;
- Advocating petroleum resource development throughout the state;
- Developing and advocating marketing strategies for Alaska oil and gas, including negotiating royalty oil purchase agreements with in-state refineries; and
- Providing technical and policy support on oil and gas issues for the DNR Commissioner's and Governor's office and Alaska's congressional delegation.

DNR Division of Parks and Outdoor Recreation

Division of Parks & Outdoor Recreation provides outdoor recreation opportunities and conserves and interprets natural, cultural, and historic resources for the use, enjoyment, and welfare of the people.

DNR Joint Pipeline Office

The Joint Pipeline Office (JPO) works with Alaska's oil and gas industry to safely operate, protect the environment, and continue transporting oil and gas in compliance with legal requirements.

DNR Office of Habitat Management and Permitting

Per Alaska Executive Order 107, the Office of Habitat Management and Permitting (OHMP) fulfills specific statutory responsibilities for:

- protecting freshwater anadromous fish habitat under the Anadromous Fish Act (AS 41.14.870) and
- providing free passage of anadromous and resident fish in fresh waterbodies (AS 41.14.840).

DNR Division of Information Center

Public Information Centers serve as the "one stop shopping" location for customer services. Customers can get applications, make payments, reserve state park public use cabins, and get general and technical information on department programs concerning land, mining, parks, geology, forestry, and oil & gas.

Subsection 5.1.3: The Department of Environmental Conservation

The role of the Alaska Department of Environmental Conservation (DEC) is fully described in Chapter 6. To summarize, per AS 46.04.040(b)(1), the issuance of DEC permits, certifications, approvals, and authorizations establishes consistency with the ACMP program for those activities of a proposed project subject to those permits, certifications, approvals or authorizations. And per AS 46.40.096(g), the reviewing entity shall exclude, or "carve out," from the consistency review and determination process the components of a project that are subject to authorization by DEC, which include all air, land or water quality determinations. The exception to this DEC "carveout" is AS 46.40.040(b)(2), where there is no DEC authorization "because the activity is a federal activity or the activity is located on federal land or the federal outer continental shelf."

Despite the statutory requirement that the activities of a project that are subject to authorization by DEC, which includes all air, land or water quality are excluded, or "carved out," from the consistency review and determination process determinations, DEC remains an active participant in the ACMP review process. Describing the entire purview of DEC's regulatory purview is difficult, as DEC's regulatory management of Alaska's air, land and water quality programs is extensive. For example, DEC's mission statement is extremely broad:

> *The State of Alaska Department of Environmental Conservation (DEC) is guided by the following mission: It is the policy of the state to conserve, improve, and protect its natural resources and environment and control water, land, and air pollution, in order to enhance the health, safety, and welfare of the people of the state and their overall economic and social well being.*

See also, DEC's "C List" items under 11 AAC 110.750(a), delineated in Chapter 4.1.

DEC's regulatory ACMP functions are set forth in 11 AAC 110:

> ***11 AAC 110.040. Review by the Department of Environmental Conservation of certain activities that are the subject of a district enforceable policy.*** *(a) This section applies to projects that are subject only to one or more Department of Environmental Conservation authorizations under 11 AAC 110.010(d).*
>
> *(b) In accordance with AS 46.40.096(k), if a district enforceable policy addresses an activity of a project subject to this section, but that activity is not subject to a Department of Environmental Conservation authorization under AS 46.40.040(b)(1), then that department shall review the activity against the applicable district enforceable policies and statewide standards.*
>
> *(c) The Department of Environmental Conservation, or the office, if agreed to by that department and the office, shall conduct the consistency review described in (b) of this section using the procedures set out in 11 AAC 110.200 – 11 AAC 110.270 after determining the scope of the activities subject to review in consultation with the coastal district.*

DEC's other functions within the ACMP are more comprehensively discussed in Chapter 6.

Subsection 5.1.4: The Department of Fish and Game

The Department of Fish and Game's mission is to protect, maintain, and improve the fish, game, and aquatic plan resources of the state, and manage their use and development for the maximum benefit of the people of the state, consistent with the sustained yield principle.

Subsection 5.1.5: The Department of Commerce, Community, and Economic Development

Promote strong communities and healthy economies by providing information, technical and financial assistance and other capacity building resources. The mission of the Division of Community Advocacy (DCA) is to achieve realization of maximum local self-government as contemplated by Article X of the Alaska Constitution. The Division promotes strong communities and healthy economies by coordinating and focusing the resources of state agencies and commissions, federal agencies and commissions, regional non-profit organizations, municipal governments, and tribal governing bodies in the context of development of public service facilities and efficient public service delivery. The division also contributes to the mission by delivering technical assistance, financial assistance, statistical information and other capacity-building and economic development resources to public and private clientele.

Subsection 5.1.6: State Agency Authorities

As fully set forth in Chapter 3, the ACMP has developed and maintains "a list of resource agency authorizations for activities that may have a reasonably foreseeable direct or indirect effect on a coastal use or resource." 11 AAC 110.750(a). That list, set out in Volume I of the "C List," identifies those state resource agency permits that require an authorization for a given use or activity. As such, those resource agency authorities, as applied within the coastal zone of the state, constitute an important component of the ACMP authority and enforceable policy system.

Section 5.2: Statewide Standards at 11 AAC 112

The state standards set forth at 11 AAC 112 will give[3] general instructions to coastal districts and state agencies in carrying out their responsibilities under AS 46.39 and AS 46.40. These standards embody the state's policy direction for natural resource development and conservation in the coastal zone, and form the basis for developing a project's consistency determination and district coastal management plan development.

As to the latter, the district enforceable policies must be consistent with the statewide standards. As discussed in greater depth below, coastal district

[3] Note that the future tense is used here because the statewide standards at 11 AAC 112 are not in effect until approved by OCRM. Per 11 AAC 112.010, "Notwithstanding any other provision of 11 AAC 110, 11 AAC 114, or this chapter, the standards of 11 AAC 112.200 - 11 AAC 112.990 apply only to consistency reviews initiated after the date the commissioner certifies to the lieutenant governor that the United States Department of Commerce has approved, under 16 U.S.C. 1455(e), the standards of 11 AAC 112.200 - 11 AAC 112.990. Subject to secs. 45 and 49, ch. 24, SLA 2003, the standards of 6 AAC 80.040 - 6 AAC 80.900 apply to consistency reviews initiated before that date."

enforceable policies clarify or add specificity to the standards, but cannot be more stringent.

As described in 11 AAC 112.020(b),

> *(1) uses and activities conducted by state agencies in the coastal area must be consistent with the applicable enforceable policies of an approved district coastal management plan and the standards contained in this chapter; and*
>
> *(2) in authorizing uses or activities in the coastal area under the state resource agency's statutory authority, each state resource agency shall grant authorization if, in addition to finding that the use or activity complies with the agency's statutes and regulations, the coordinating agency finds that the use or activity is consistent with the applicable enforceable policies of an approved district coastal management plan and the standards contained in this chapter.*

Subsection 5.2.1: Coastal Development

11 AAC 112.200. Coastal development. *(a) In planning for and approving development in or adjacent to coastal waters, districts and state agencies shall manage coastal land and water uses in such a manner that those uses that are economically or physically dependent on a coastal location are given higher priority when compared to uses that do not economically or physically require a coastal location.*

(b) Districts and state agencies shall give, in the following order, priority to

(1) water-dependent uses and activities;

(2) water-related uses and activities; and

(3) uses and activities that are neither water-dependent nor water-related for which there is no practicable inland alternative to meet the public need for the use or activity.

(c) The placement of structures and the discharge of dredged or fill material into coastal water must, at a minimum, comply with the standards contained in 33 C.F.R. Parts 320 - 323, revised as of July 1, 2003.

This standard is limited in applicability to development in or adjacent to coastal waters. The coastal development standard sets forth a requirement that the districts and state agencies prioritize the uses and activities in the coastal area based upon whether the uses are water dependent, water-related, or neither but without an inland alternative. It is a requirement that the more water-dependent the use or activity, the higher priority it shall receive.

11 AAC 112.200(c) references the COE 404 permitting authority. Inclusion of this federal citation was approved in the ACMP's previous regulations at 6 AAC 80. During the recent regulation revision process, DNR made only technical changes to the date and title of the COE 404 permitting authority. Importantly, this state standard calls for compliance, "at a minimum" with the federal authorities cited. This is an important qualifier to distinguish an otherwise impermissible incorporation of a federal statute into the state coastal management program. As worded, the standard does not assume primacy over the COE 404 permitting authority and *require compliance*, as determined by the state, with the existing standards contained in 33 C.F.R. Parts 320 – 323. Rather, the qualifier acknowledges the COE 404 permitting authority and acts as a means by which coastal districts are invited to draft enforceable policies *more specific* than the standards noted in 33 C.F.R. Parts 320 – 323. By so doing, the standard presents a potential area for district enforceable policies to be written by affected localities.

Subsection 5.2.2: Natural Hazard Areas

11 AAC 112.210. Natural hazard areas. *(a) In addition to those identified in 11 AAC 112.990, the department, or a district in a district plan, may designate other natural processes or adverse conditions that present a threat to life or property in the coastal area as natural hazards. Such designations must provide the scientific basis for designating the natural process or adverse condition as a natural hazard in the coastal area, along with supporting scientific evidence for the designation.*

(b) Areas likely to be affected by the occurrence of a natural hazard may be designated as natural hazard areas by a state agency or, under 11 AAC 114.250(b), by a district.

(c) Development in a natural hazard area may not be found consistent unless the applicant has taken appropriate measures in the siting, design, construction, and operation of the proposed activity to protect public safety, services, and the environment from potential damage caused by known natural hazards.

(d) For purposes of (c) of this section, "appropriate measures in the siting, design, construction, and operation of the proposed activity" means those measures that, in the judgment of the coordinating agency, in consultation with the department's division of geological and geophysical surveys, the Department of Community and Economic Development as state coordinating agency for the National Flood Insurance Program under 44 C.F.R. 60.25, and other local and state agencies with expertise,

(1) satisfy relevant codes and safety standards; or

(2) in the absence of such codes and standards;

(A) the project plans are approved by an engineer who is registered in the state and has engineering experience concerning the specific natural hazard; or

(B) the level of risk presented by the design of the project is low and appropriately addressed by the project plans.

The natural hazard standard establishes the designation of natural hazards as a planning function, and sets the standard by which proposed project must comply. The standard applies throughout the coastal area to those natural hazard areas designated by DNR or a coastal district.

The standard requires that activities located within, or as provided for at 11 AAC 110.015, affecting these designated natural hazard areas comply with the listed criteria. The standard establishes that building codes and safety and engineering standards may be an appropriate mechanism for addressing these types of issues in the context of a project consistency review. Section (b)(2)(B) involving the judgment of a project engineer only applies in the absence of local codes and standards and still involves "the judgment of the coordinating agency, in consultation with . . . state and local agencies with expertise."

The standard provides that the coordinating agency consult with appropriate natural hazard experts in the Division of Geological & Geophysical Surveys, the flood program in the Department of Community and Economic and "other local or state agencies with expertise" to determine consistency and compliance with the criteria of the standard.

Subsection 5.2.3: Coastal Access

11 AAC 112.220. Coastal access. *Districts and state agencies shall ensure that projects maintain and, where appropriate, increase public access to, from, and along coastal water.*

This standard applies throughout the coastal area to, from, and along coastal waters. The coastal access standard mandates the maintenance of, and possibly enhancement of, public access to Alaska's coastline. Whether compliance with the access standard involves creation of docks or other "increased" access facilities involves a case-by-case analysis.

Subsection 5.2.4: Energy Facilities

11 AAC 112.230. Energy facilities. *(a) The siting and approval of major energy facilities by districts and state agencies must be based, to the extent practicable, on the following standards:*

(1) site facilities so as to minimize adverse environmental and social effects while satisfying industrial requirements;

(2) site facilities so as to be compatible with existing and subsequent adjacent uses and projected community needs;

(3) consolidate facilities;

(4) consider the concurrent use of facilities for public or economic reasons;

(5) cooperate with landowners, developers, and federal agencies in the development of facilities;

(6) select sites with sufficient acreage to allow for reasonable expansion of facilities;

(7) site facilities where existing infrastructure, including roads, docks, and airstrips, is capable of satisfying industrial requirements;

(8) select harbors and shipping routes with least exposure to reefs, shoals, drift ice, and other obstructions;

(9) encourage the use of vessel traffic control and collision avoidance systems;

(10) select sites where development will require minimal site clearing, dredging, and construction;

(11) site facilities so as to minimize the probability, along shipping routes, of spills or other forms of contamination that would affect fishing grounds, spawning grounds, and other biologically productive or vulnerable habitats, including marine mammal rookeries and hauling out grounds and waterfowl nesting areas;

(12) site facilities so that design and construction of those facilities and support infrastructures in coastal areas will allow for the free passage and movement of fish and wildlife with due consideration for historic migratory patterns;

(13) site facilities so that areas of particular scenic, recreational, environmental, or cultural value, identified in district plans, will be protected;

(14) site facilities in areas of least biological productivity, diversity, and vulnerability and where effluents and spills can be controlled or contained;

(15) site facilities where winds and air currents disperse airborne emissions that cannot be captured before escape into the atmosphere;

(16) site facilities so that associated vessel operations or activities will not result in overcrowded harbors or interfere with fishing operations and equipment.

(b) The uses authorized by the issuance of state and federal leases, easements, contracts, rights-of-way, or permits for mineral and petroleum resource extraction are uses of state concern.

This standard applies throughout the coastal area. The energy facilities siting standard provides the compliance criteria for those facilities defined as a "major energy facility," which is defined at 11 AAC 112.990(15):

(A) means a development of more than local concern carried out in, or in close proximity to, the coastal area, that is:

(i) required to support energy operations for exploration or production purposes;

(ii) used to produce, convert, process, or store energy resources or marketable products;

(iii) used to transfer, transport, import, or export energy resources or marketable products;

(iv) used for in-state energy use; or

(v) used primarily for the manufacture, production, or assembly of equipment, machinery, products, or devices that are involved in an activity described in (i) - (iv) of this subparagraph;

(B) includes marine service bases and storage depots, pipelines and rights-of-way, drilling rigs and platforms, petroleum or coal separation, treatment, or storage facilities, liquid natural gas plants and terminals, oil terminals and other port development for the transfer of energy products, petrochemical plants, refineries and associated facilities, hydroelectric projects, other electric generating plants, transmission lines, uranium enrichment or nuclear fuel processing facilities, geothermal facilities, natural gas pipelines and rights-of-way, natural gas treatment and processing facilities, and infrastructure related to natural gas treatment and processing facilities.

Subsection 5.2.5: Utility Routes and Facilities

11 AAC 112.240. Utility routes and facilities. *(a) Utility routes and facilities must be sited inland from beaches and shorelines unless*

(1) the route or facility is water-dependent or water related; or

(2) no practicable inland alternative exists to meet the public need for the route or facility.

(b) Utility routes and facilities along the coast must avoid, minimize, or mitigate

(1) alterations in surface and ground water drainage patterns;

(2) disruption in known or reasonably foreseeable wildlife transit;

(3) blockage of existing or traditional access.

This standard applies throughout the coastal area.

Subsection 5.2.6: Timber Harvest and Processing

11 AAC 112.250. Timber harvest and processing. *AS 41.17 (Forest Resources and Practices Act) and the regulations adopted under that chapter with respect to the harvest and processing of timber are incorporated into the program and constitute the components of the program with respect to those purposes.*

Subsection 5.2.7: Sand and Gravel Extraction

11 AAC 112.260. Sand and gravel extraction. *Sand and gravel may be extracted from coastal waters, intertidal areas, barrier islands, and spits if there is no practicable alternative to coastal extraction that will meet the public need for the sand or gravel.*

This standard applies throughout the coastal area.

Subsection 5.2.8: Subsistence

11 AAC 112.270. Subsistence. *(a) A project within a subsistence use area designated by the department or under 11 AAC 114.250(g) must avoid or minimize impacts to subsistence uses of coastal resources.*

(b) For a project within a subsistence use area designated under 11 AAC 114.250(g), the applicant shall submit an analysis or evaluation of reasonably foreseeable adverse impacts of the project on subsistence use as part of

(1) a consistency review packet submitted under 11 AAC 110.215; and

(2) a consistency evaluation under 15 C.F.R. 930.39, 15 C.F.R. 930.58, or 15 C.F.R. 930.76.

(c) Repealed ___/___/2004.

(d) Except in nonsubsistence areas identified under AS 16.05.258, the department may, after consultation with the appropriate district, federally recognized Indian tribes, Native corporations, and other appropriate persons or groups, designate areas in which a subsistence use is an important use of coastal resources as demonstrated by local usage.

(e) For purposes of this section, "federally recognized Indian tribe," "local usage," and "Native corporation" have the meanings given in 11 AAC 114.990.

Few issues generate as much emotion and attention as the issue of subsistence in Alaska. DNR always has recognized, and continues to recognize, subsistence as a critically important use of coastal resources, and continues to strive toward the goal of assuring subsistence use of the coastal resources. The

importance of subsistence was enunciated in the 1979 FEIS: "The subsistence lifestyle … is a unique cultural aspect of Alaska. Practiced by Natives and non-Native alike, subsistence competes with other uses of coastal resources. Protecting subsistence is one of the most important coastal issues." ACMP FEIS, p. 35. While a designation may be made throughout the coastal area, designations are not allowed on federal land. However, as provided for at 11 AAC 110.015, the subsistence standard is applied when a use or activity subject to the consistency review under 11 AAC 110 is proposed to be located within or affecting an approved designated area in which subsistence use is an important use of coastal use of coastal resources. Only DNR or the district may designate a subsistence use area.

The subsistence standard mandates that projects avoid impacts altogether to subsistence uses of coastal resources. Or, where complete avoidance of adverse impacts is proven by the applicant to be impracticable, project reviewers can require that the adverse impacts to the subsistence uses of coastal resources be minimized.

It should be noted that the "mitigation" prong is not included in the subsistence standard's avoid or minimize sequencing process. That is because DNR recognizes how subsistence is deemed so important to Alaska, and its peoples dependent on subsistence, that avoidance or minimization are the only options. If adverse impacts to subsistence uses of coastal resources cannot be avoided altogether or minimized, then no amount of "mitigation" will be allowed, and the development will not found consistent with the ACMP.

Subsection 5.2.9: Transportation Routes and Facilities

11 AAC 112.280. Transportation routes and facilities. *Transportation routes and facilities must avoid, minimize, or mitigate*

(1) alterations in surface and ground water drainage patterns;

(2) disruption in known or reasonably foreseeable wildlife transit; and

(3) blockage of existing or traditional access.

This standard applies throughout the coastal area. This standard makes it clear that all transportation routes and facilities must avoid, minimize, or mitigate alterations in surface and ground water drainage patterns, disruption in known or reasonably foreseeable wildlife transit and blockage of existing or traditional access. "Transportation routes and facilities" is defined at 11 AAC 112.990(28) as to include "natural transportation routes dictated by geography or oceanography, roads, highways, railways, air terminals, and facilities required to operate and maintain the route or facility."

Subsection 5.2.10: Habitats

11 AAC 112.300. Habitats. *(a) Habitats in the coastal area that are subject to the program are*

(1) offshore areas;

(2) estuaries;

(3) wetlands;

(4) tideflats;

(5) rocky islands and sea cliffs;

(6) barrier islands and lagoons;

(7) exposed high-energy coasts;

(8) rivers, streams, and lakes and the active floodplains and riparian management areas of those rivers, streams, and lakes; and

(9) important habitat.

(b) The following standards apply to the management of the habitats identified in (a) of this section:

(1) offshore areas must be managed to avoid, minimize, or mitigate significant adverse impacts to competing uses such as commercial, recreational, or subsistence fishing, to the extent that those uses are determined to be in competition with the proposed use;

(2) estuaries must be managed to avoid, minimize, or mitigate significant adverse impacts to

(A) adequate water flow and natural water circulation patterns; and

(B) competing uses such as commercial, recreational, or subsistence fishing, to the extent that those uses are determined to be in competition with the proposed use;

(3) wetlands must be managed to avoid, minimize, or mitigate significant adverse impacts to water flow and natural drainage patterns;

(4) tideflats must be managed to avoid, minimize, or mitigate significant adverse impacts to

(A) water flow and natural drainage patterns; and

(B) competing uses such as commercial, recreational, or subsistence uses, to the extent that those uses are determined to be in competition with the proposed use;

(5) rocky islands and sea cliffs must be managed to

(A) avoid, minimize, or mitigate significant adverse impacts to habitat used by coastal species; and

(B) avoid the introduction of competing or destructive species and predators;

(6) barrier islands and lagoons must be managed to avoid, minimize, or mitigate significant adverse impacts

(A) to flows of sediments and water;

(B) from the alteration or redirection of wave energy or marine currents that would lead to the filling in of lagoons or the erosion of barrier islands; and

(C) from activities that would decrease the use of barrier islands by coastal species, including polar bears and nesting birds;

(7) exposed high-energy coasts must be managed to avoid, minimize, or mitigate significant adverse impacts

(A) to the mix and transport of sediments; and

(B) from redirection of transport processes and wave energy;

(8) rivers, streams, and lakes must be managed to avoid, minimize, or mitigate significant adverse impacts to

(A) natural water flow;

(B) active floodplains; and

(C) natural vegetation within riparian management areas; and

(9) important habitat

(A) designated under 11 AAC 114.250(h) must be managed for the special productivity of the habitat in accordance with district enforceable policies adopted under 11 AAC 114.270(g); or

(B) identified under (c)(1)(B) or (C) of this section must be managed to avoid, minimize, or mitigate significant adverse impacts to the special productivity of the habitat.

(c) For purposes of this section,

(1) "important habitat" means habitats listed in (a)(1) – (8) of this section and other habitats in the coastal area that are

(A) designated under 11 AAC 114.250(h);

(B) identified by the department as a habitat

(i) the use of which has a direct and significant impact on coastal water; and

(ii) that is shown by written scientific evidence to be biologically and significantly productive; or

(C) identified as state game refuges, state game sanctuaries, state range areas, or fish and game critical habitat areas under AS 16.20;

(2) "riparian management area" means the area along or around a waterbody within the following distances, measured from the outermost extent of the ordinary high water mark of the waterbody:

(A) for the braided portions of a river or stream, 500 feet on either side of the waterbody;

(B) for split channel portions of a river or stream, 200 feet on either side of the waterbody;

(C) for single channel portions of a river or stream, 100 feet on either side of the waterbody;

(D) for a lake, 100 feet of the waterbody.

The habitats standard involves a painstaking process to balance the competing interest in, use of, protection of, and maintenance of coastal habitat resources.

Subsection 5.2.11: Air, Land, and Water Quality

11 AAC 112.310. Air, land, and water quality. *Notwithstanding any other provision of this chapter, the statutes and regulations of the Department of Environmental Conservation with respect to the protection of air, land, and water quality identified in AS 46.40.040(b) are incorporated into the program and, as administered by that department, constitute the exclusive components of the program with respect to those purposes.*

AS 46.40.040(b) reads, in part, that "AS 46.03, AS 46.04, AS 46.09, AS 46.14, and the regulations adopted under those statutes constitute the exclusive enforceable policies of the Alaska coastal management program for those purposes." Per AS 46.04.040(b), DEC's air, land and water quality standards are the exclusive standards of the ACMP for those purposes. The DEC standards include, but are not limited to, the following subject areas:

- Prevention, control and abatement of any water, land, subsurface land, and air pollution, and other sources or potential sources of pollution of the environment;
- Prevention and control of public health nuisances;
- Safeguard standards for petroleum and natural gas pipeline construction, operation, modification, or alteration;
- Protection of public water supplies by establishing minimum drinking water standards, and standards for the construction, improvement, and maintenance of public water supply systems;
- Collection and disposal of sewage and industrial waste;
- Collection and disposal of garbage, refuse, and other discarded solid materials from industrial, commercial, agricultural, and community activities or operations;
- Control of pesticides; and
- Handling, transportation, treatment, storage, and disposal of hazardous wastes.

Notwithstanding federally delegated portions of the federal Clean Water Act and Clean Air Act for which Alaska has been given primacy, those federal statutes are not incorporated into the ACMP per se. However, through the state standard at 11 AAC 112.310, the ACMP air and water quality requirements, as administered by

DEC, are incorporated into the program, and frequently apply a more stringent standard upon permissible uses and activities than the federal CWA and CAA.

Subsection 5.2.12: Historic, Prehistoric, and Archeological Resources

11 AAC 112.320. Historic, prehistoric, and archeological resources. *(a) The department will designate areas of the coastal zone that are important to the study, understanding, or illustration of national, state, or local history or prehistory, including natural processes.*

(b) A project within an area designated under (a) of this section shall comply with the applicable requirements of AS 41.35.010 – 41.35.240 and 11 AAC 16.010 – 11 AAC 16.900.

This standard implements the Alaska Historic Preservation Act in the coastal zone. Districts may designate additional areas under 11 AAC 114.250(i) and establish policies for those areas if the policies meet the "matter of local concern" test. Subsection (b) provides that projects in designated areas or, as provided for in 11 AAC 110.015, affecting the designated area, must comply with the Alaska Historic Preservation Act and its implementing regulations. The intent of this standard is to comply with CZMA's policy of "sensitive preservation and restoration of historic and cultural . . . coastal features," and not to create new standards beyond those authorized in state law. 16 U.S.C. §1452(2)(F); 15 C.F.R. §923.23. DNR feels that the designation of these areas by DNR's Office of History and Archeology as part of Alaska's existing historic preservation act (and in light of the National Historic Preservation Act of 1966 and other laws) provides the planning tools for consideration of these coastal values as part of project reviews and program implementation by the districts. Finally, DNR notes that designating an area "as important to the study, understanding, or illustration of . . . prehistory" does not require knowledge of the precise location of archeological sites as long as there is an archeological basis for designation of the area.

Subsection 5.2.13: Sequencing Process to Avoid, Minimize, or Mitigate

11 AAC 112.900. Sequencing process to avoid, minimize, or mitigate. *(a) As used in this chapter and for purposes of district enforceable policies developed under 11 AAC 114, "avoid, minimize, or mitigate" means a sequencing process of*

(1) avoiding adverse impacts to the maximum extent practicable;

(2) where avoidance is not practicable, minimizing adverse impacts to the maximum extent practicable; or

(3) if neither avoidance nor minimization is practicable, conducting mitigation to the extent appropriate and practicable; for purposes of this paragraph, "mitigation" means

(A) on-site rehabilitation of project impacts to affected coastal resources during or at the end of the life of the project; or

(B) to the extent on-site rehabilitation of project impacts is not practicable, substituting, if practicable, rehabilitation of or an improvement to affected coastal resources within the district, either on-site or off-site, for a coastal resource that is unavoidably impacted.

(b) For a project that requires a federal authorization identified under 11 AAC 110.400, the coordinating agency shall consult with the authorizing federal agency during that federal agency's authorization review process to determine whether the mitigation requirements proposed by the federal agency for that federal authorization would satisfy the mitigation requirements of (a)(3) of this section. If the coordinating agency determines that the mitigation requirements proposed by the federal agency would not satisfy the mitigation requirements of (a)(3) of this section, the coordinating agency shall require appropriate mitigation in accordance with (a)(3) of this section.

(c) For purposes of (a)(3) of this section, a determination of practicability includes the consideration of the following factors, as applicable:

(1) the magnitude of the functional values lost by the impacted coastal resources;

(2) the likelihood that the mitigation measure or improvement will succeed in actually rehabilitating the impacted coastal resources; and

(3) the correlation between the functional values lost by the coastal resources impacted and the proposed mitigation measure or improvement.

(d) To the extent feasible and not otherwise addressed by state or federal law, any requirements imposed under (a)(3) of this section for mitigation through on-site or off-site rehabilitation of project impacts shall be established by the coordinating agency at the time of the project's consistency review under 11 AAC 110.

(e) In applying the mitigation process described in (a)(3) of this section, unless required by a federal agency issuing an authorization identified under 11 AAC 110.400 for the project, the coordinating agency may not require

(1) that no net loss of impacted coastal resources occur; or

(2) monetary compensation.

A modified standard appears throughout 11 AAC 112 imposing a requirement upon applicants to "avoid, minimize, or mitigate" adverse impacts to a given use or resource. The standard appears in the utilities and roads section at 11 AAC 112.240, the transportation routes and facilities section at 11 AAC 112.280, and throughout the habitats sections at 11 AAC 112.300.

The "avoid, minimize, or mitigate" standard is a stringent one. Applicants must attempt, first and foremost, to avoid adverse impacts – <u>any</u> adverse impacts –

altogether. Only where avoiding the impacts to the maximum extent practicable may the applicant then attempt to "minimize" the adverse impacts. Then, only if the applicant cannot minimize adverse impacts to the maximum extent practicable may the applicant proceed to the final phase, whereby the project would be required to "mitigate" impacts. This mitigation prong in the analysis requires an applicant that cannot avoid or minimize impacts to the maximum extent practicable to rehabilitate impacted resources, or alternatively, improve a different site.

The term "rehabilitate" is used in the standard primarily to address the large project scenario, where restoration is not a realistic goal, but rehabilitation is. For example, a mine with a 30-year life can never restore the resources, and to "replace" a like amount of resources is virtually impossible as well. However, the mine can be "rehabilitated" to pristine conditions. Or, if it cannot be rehabilitated on-site, then the regulations allow for a plan whereby the applicant must substitute rehabilitation of, or improve, other coastal resources, either on-site or off-site. Thus, the "rehabilitation" standard ensures that, at the close of the project's life, the disturbed conditions will be allowed to recuperate such that it retains environmental value, or that rehabilitation/improvements will occur elsewhere. Subsection (e) of this section prohibits the coordinating agency from requiring monetary compensation or that "no net loss" of impacted coastal resources occur. As to the monetary compensation prohibition, the concept of payment of money, commonly referred to as a "fee in lieu of" impacted resources approach, was never intended by the ACMP. The regulations thus make explicit that that "mitigation" may not involve a "fee in lieu of" impacted resources approach.

The basis of the prohibition against the coordinating agency requiring "no net loss" of impacted coastal resources originates from DNR's policy decision to distance the ACMP from the Army Corps of Engineers' 1990 wetlands regulations, which were developed in pursuit of a "no net loss" of wetlands policy ("[I]t remains a goal of the Section 404 regulatory program to contribute to the national goal of no overall net loss of the nation's remaining wetlands base." See EPA/Army MOA, 55 Fed. Reg. 9210, 9211-12 (Mar. 12, 1990).

Unlike the Section 404 regulatory program, the ACMP cannot be viewed as a "no net loss" program. Rather, it is a management statute designed to coordinate consistency reviews by DNR or the coordinating agency, with a goal of involving those with expertise and stakeholders to establish consistency only when applicable standards are met. The 1979 ACMP FEIS demonstrates that a no net loss of coastal resources was never envisioned at the inception and approval of the program: "…complete nondegradation is an impossible standard to meet, and [] in certain instances tradeoffs between natural values and other human values will have to be made …." (ACMP FEIS, "Policies Objectives and Standards of the Program," p.

76). Congress in enacting the CZMA has similarly recognized these tradeoffs in managing coastal resources and development. See 16 U.S.C. §1451(a),(f),(j); 1452(2), (2)(D); 1455(d)(2)(H). Therefore, the standard is explicit that "no net loss" cannot be required. This is not to say that projects cannot be implemented with a resultant no net loss of coastal resources – this result could and should occur when the project is taken through the first step of the sequencing process, to completely avoid impacts. In fact, it is anticipated that the vast majority of projects will go no further in the analysis than this: if the project does not completely avoid adverse impacts to coastal resources, then the project will not be allowed. However, some projects, when measured against the "practicability" test, will be authorized to move to the "minimization" analysis, and then, a rare few projects may even make a sufficient showing of impracticability to allow it to get to "mitigation."

The standard uses an "or" connector rather than an "and" ("avoid, minimize, or mitigate") because a project cannot logically avoid and minimize impacts to a particular resource; the applicant can attempt to comply with one or the other but not both. The logical regulatory formulation of the test is that the applicant must avoid, minimize or mitigate.

Of final note in 11 AAC 112.900 is subsection (b), under which, when a project requires a federal authorization identified under 11 AAC 110.400, the coordinating agency must consult with the authorizing federal agency to determine whether the mitigation requirements proposed by the federal agency for that federal authorization would satisfy the ACMP mitigation requirements. If the coordinating agency determined that the mitigation requirements proposed by the federal agency would not satisfy ACMP mitigation requirements, the coordinating agency shall require appropriate mitigation.

Section 5.3: Coastal District Enforceable Policies Developed and Approved Under 11 AAC 114

The following sections will describe various components, issues, and requirements associated with coastal district plans. The section will concentrate on clarifying potentially fine distinctions and processes in 11 AAC 114.270.

Subsection 5.3.1: Standards for Development of District Enforceable Policies

A coastal resource district must develop and adopt their coastal district management plan in accordance with AS 46.40 and 11 AAC 114. In developing the enforceable policies of the coastal district management plan, per AS 46.40.030(b), the "coastal resource district shall meet the requirements of AS 46.40.070 and shall

not duplicate, restate, or incorporate by reference statutes and administrative regulations adopted by state or federal agencies."

AS 46.40.070(a) provides the requirements for the review and approval of district coastal management plans:

> *(a) The department shall approve a district coastal management plan submitted for review and approval if*
>
> *(1) the district coastal management plan meets the requirements of this chapter and the statewide standards and district plan criteria adopted by the department; and*
>
> *(2) the enforceable policies of the district coastal management plan*
>
> *(A) are clear and concise as to the activities and persons affected by the policies, and the requirements of the policies;*
>
> *(B) use precise, prescriptive, and enforceable language; and*
>
> *(C) do not address a matter regulated or authorized by state or federal law unless the enforceable policies relate specifically to a matter of local concern; for purposes of this subparagraph, "matter of local concern" means a specific coastal use or resource within a defined portion of the district's coastal zone, that is*
>
> *(i) demonstrated as sensitive to development;*
>
> *(ii) not adequately addressed by state or federal law; and*
>
> *(iii) of unique concern to the coastal resource district as demonstrated by local usage or scientific evidence.*

11 AAC 114.270 establishes the criteria specific to approval of enforceable policies of a coastal district management plan:

> ***11 AAC 114.270. District enforceable policies.*** *(a) The enforceable policies of a district are legally binding and provide the basis for a determination of consistency with the district plan. A district plan may include only enforceable policies developed under AS 46.40.030, AS 46.40.040, and this chapter that will be applied to the subject uses, activities, and resources identified in the district plan under 11 AAC 114.230 and 11 AAC 114.250. District enforceable policies must*
>
> *(1) address only uses and activities identified in 11 AAC 112.200 - 11 AAC 112.240 and 11 AAC 112.260 - 11 AAC 112.280 and areas designated under 11 AAC 114.250(b) - (i); and*
>
> *(2) meet the requirements of this section.*

(b) A district plan must clearly identify each district enforceable policy. Except for a boundary map or description developed under (g) of this section, district enforceable policies must be located in a single section of the district plan.

(c) Except as provided in (d) of this section, a district may not adopt enforceable policies that duplicate, restate, or incorporate by reference statutes or administrative regulations adopted by state or federal agencies, including 11 AAC 112.

(d) Unless a district can demonstrate that a matter is of local concern as defined in AS 46.40.070(a)(2)(C), a district may not adopt, and the commissioner will not approve, an enforceable policy that addresses matters included in the statewide standards contained in 11 AAC 112.200 – 11 AAC 112.240 and 11 AAC 112.260 – 11 AAC 112.280.

(e) A district enforceable policy must

(1) be clear and concise as to the activities and persons affected by the policy and the requirements of the policy;

(2) use precise, prescriptive, and enforceable language;

(3) not address a matter regulated or authorized by state or federal law unless the enforceable policy relates to a matter of local concern as defined in AS 46.40.070(a)(2)(C); and

(4) not arbitrarily or unreasonably restrict or exclude uses of state concern.

(f) In accordance with AS 46.40.040(b), a district may not address a matter regulated by the Department of Environmental Conservation under to AS 46.03, AS 46.04, AS 46.09, and AS 46.14 and the regulations adopted under those statutes.

(g) For an area designated by a district under 11 AAC 114.250(b) - (i), for a special area management plan developed under 11 AAC 114.400, or for an area which merits special attention inside a district developed under 11 AAC 114.420, a district may adopt enforceable policies that will be used to determine whether a specific land or water use or activity will be allowed. An area subject to these policies must be described or mapped at a scale sufficient to determine whether a use or activity is located within the area. A description or map developed under this subsection must be referenced in the applicable enforceable policy and is an enforceable component of the district plan.

(h) In reviewing and approving a district enforceable policy developed under this chapter that addresses a matter of local concern defined in AS 46.40.070(a)(2)(C), the commissioner must find that

(1) the coastal use or resource

(A) is within a defined portion of the district's coastal zone that has been mapped or described under 11 AAC 114.230(c)(1);

(B) has been demonstrated as sensitive to development in the resource analysis developed under 11 AAC 114.240(a);

(C) is not adequately addressed by state or federal law, including consideration of comments by the appropriate state or federal agency in comments on the public hearing draft under 11 AAC.114.315 or during consultation under 11 AAC 114.340(c)(5); and

(D) is of unique concern to the coastal resource district as demonstrated by local usage or scientific evidence that has been documented in a resource analysis under 11 AAC 114.240(c); and

(2) the language and subject matter of the enforceable policies meets the requirements of (e) of this section.

(i) Notwithstanding any contrary provision of (e)(3) of this section, enforceable policies contained in a district plan approved by the former Coastal Policy Council under former 6 AAC 85.195 – 6 AAC 85.225 and in effect on July 1, 2004, satisfy the requirements of AS 46.40.070(a)(2)(C)(i) and (iii). However, those enforceable policies must be revised as appropriate to meet all other requirements of AS 46.40.030 and 46.40.070.

These regulations substantially revise the criteria for district enforceable policies. Following is a brief overview of the principal requirements and restrictions on district enforceable policies. These items will be discussed in greater detail in subsequent subsections.

First, under the authority of AS 46.40.030, AS 46.40.040 and 11 AAC 114.250(a) (discussed in greater detail below at Subsection 5.3.3), the policy must generally relate to, or "flow from," one of the following uses or activities :

- 112.200 Coastal development
- 112.210 Natural hazard areas (designated areas only)
- 112.220 Coastal access
- 112.230 Energy facilities (designated areas only)
- 112.240 Utility routes and facilities
- 112.260 Sand and gravel extraction
- 112.270 Subsistence (designated areas only)
- 112.280 Transportation routes & facilities
- 114.250(b) natural hazard designations
- 114.250(c) recreational use designations
- 114.250(d) tourism use designations
- 114.250(e) energy facility sites
- 114.250(f) fish & seafood processing facilities & sites
- 114.250(g) subsistence use designations

- 114.250(h) important habitat designations
- 114.250(i) historical and prehistorical designations

Second, a district enforceable policy may not address any matter regulated by DEC (AS 46.03, AS 46.06, AS 46.09, AS 46.17 and the regulations there under). This includes policies that are more or less stringent than a DEC standard on a regulated subject area.

Third, per AS 46.40.070(c) (discussed in greater detail below at Subsection 5.3.4), the policy may not adopt, duplicate, repeat, restate, or incorporate by reference a state standard or other state or federal law.

Fourth, per AS 46.40.070(d) (discussed in greater detail at Subsection 5.3.5), if the policy addresses a subject matter regulated or authorized by state or federal law, then it must relate to a "matter of local concern." .

Fifth, per AS 46.40.070 (a)(2)(C) and 11 AAC 114.230, .240 and .270, any "matter of local concern" must be documented in the plan and must address a coastal use or resource that:

- is within a defined portion of the district's coastal zone, typically identified in the resource inventory.
- relates to an area defined narratively or mapped.
- is sensitive to development.
- is not adequately addressed by state or federal law, and
- is of unique concern to the district as demonstrated by documentation of local usage or scientific evidence.

Sixth, per AS 46.40.070 (a)(2)(A) and (B) and 11 AAC 114.270(e), the policy must be clear and concise as to the activities and persons affected and its requirements, and use precise, prescriptive and enforceable language. It must be clear in either the policy or implementation chapter how to implement, who implements, who enforces, and who has expertise in determining compliance with the policy. The policy must use objective language. For example, a policy requiring a study must clarify when the study must be completed, who is to perform the study, how the results of the study are to be evaluated to determine compliance with the ACMP.

Seventh, per 11 AAC 114.270(h), the policy must be supported by the resource inventory and analysis.

Eighth, a district can reference the state standard but cannot restate or incorporate state or federal law. In some cases, coastal districts will find it easiest when developing a district enforceable policy to add specificity to existing language from a state standard. Thus, while referring to a state standard is permissible (e.g., "In accordance with 11 AAC 112.200 Water-dependent uses include…"), incorporating or relying upon the standard is not.

Subsection 5.3.2: Revised District Enforceable Policies

The following are coastal districts with coastal district management plans. Each of the coastal district management plans have enforceable policies, all of which have been previously approved by OCRM, and which have been incorporated into the approved ACMP to date.

- Aleutians East Borough
- Aleutians West Coastal Resource Service Area
- Bering Straits Coastal Resource Service Area
- Bristol Bay Borough
- Bristol Bay Coastal Resource Service Area
- Ceñaliulriit Coastal Resource Service Area
- City and Borough of Haines
- City and Borough of Juneau
- City and Borough of Sitka
- City and Borough of Yakutat
- City of Angoon
- City of Bethel
- City of Cordova
- City of Craig
- City of Hoonah
- City of Hydaburg
- City of Kake
- City of Klawock
- City of Nome
- City of Pelican
- City of St. Paul
- City of Skagway
- City of Thorne Bay
- City of Valdez
- City of Whittier
- Kenai Peninsula Borough
- Ketchikan Gateway Borough

- Kodiak Island Borough
- Lake and Peninsula Borough
- Matanuska-Susitna Borough
- Municipality of Anchorage
- North Slope Borough
- Northwest Arctic Borough

Each of these coastal resource districts must revise their coastal district plan, including the areas meriting special attention and special area management plans, to comply with the mandate of ch. 24, SLA 2003 ("HB 191"), AS 46.40, and 11 AAC 114, and ch. 31, SLA 2005 ("SB 102").

As to the timing of the revised plans, Section 47 of HB 191, as modified by Section 17 of SB 102 requires the districts to submit revised plans "within 20 months after the effective date of regulations adopted by the Department of Natural Resources implementing changes to AS 46.40.010 - 46.40.090." The ACMP regulations at 11 AAC 110, 11 AAC 112, and 11 AAC 114 implementing those statutory revisions were adopted on May 26, 2004, with an effective date of July 1, 2004. The 20 month window for districts to submit revised plans began running on July 1, 2004, since that is "the effective date of regulations adopted by the Department of Natural Resources implementing changes to AS 46.40.010 – 46.40.090" in compliance with the mandate of HB 191.

Plan revisions that are submitted by the March 1, 2006, deadline will have a priority status for review and approval by DNR under the transition provisions at 11 AAC 114.345. If a district fails to submit a revised plan by the March 1, 2006 deadline, that district may not avail itself of the priority afforded by 11 AAC 114.345, and instead will be required to follow the significant amendment process for review and approval of its plan revisions under Article 3 of 11 AAC 114.

As provided in Section 46 of HB 191, "a district coastal management program, including its enforceable policies, approved by the former Alaska Coastal Policy Council remains in effect for purposes of AS 46.39 and AS 46.40 until July 1, 2006, unless the Department of Natural Resources disapproves or modifies all or part of the program before July 1, 2006." If a coastal district fails to submit a revised plan by the deadline, or submits a plan that DNR cannot approve in accordance with AS 46.40 and 11 AAC 114, the district plan and the enforceable policies of that plan will sunset on March 1, 2007, as modified by Section 16 of SB 102.

Subsection 5.3.3: "Flow From" Concept

Beginning the eight-point analysis described above in section 5.3.1 is the requirement of 11 AAC 114.270(a)(1), that district policies may only address uses and activities and impacts identified in 11 AAC 112.200 – 11 AAC 112.240 and 11 AAC 112.260 - 11 AAC 112.280, and areas designated under 11 AAC 114.250(b) - (i). This regulatory limitation has been referred to as the "flow from" concept. Simply put, district enforceable policies may only "flow from" the list of existing uses, activities, and impacts within the state standards that are explicitly enumerated in each standard, or from the areas that have been designated under 11 AAC 114.250(b) - (i).

The authority for this policy restriction on permissible district enforceable policies originates from two statutes. First, AS 46.40.030 states, "The [district] plan must meet the statewide standards and district plan criteria adopted under AS 46.40.040…." Second, AS 46.40.040(a) states in relevant part,

> "[DNR] shall … by regulation, adopt … for the use of and application by coastal resource districts and state agencies …, statewide standards and district coastal management plan criteria for…determining the land and water uses and activities subject to the Alaska coastal management program; … developing policies applicable to the land and water uses subject to the Alaska coastal management program; … [and] developing regulations applicable to the land and water uses subject to the Alaska coastal management program;…"

In other words, DNR was charged by operation of law to define precisely what land and water uses and activities are to be subject to the Alaska coastal management program, which includes, by necessity, establishing restrictions on what matters districts may write enforceable policies. Pursuant to its statutory mandate, DNR identified nine major uses or activities subject to the ACMP, and three categories of resources and habitats subject to the ACMP (including nine specific habitat types), and for each, promulgated a statewide standard or set of statewide standards. Because DNR is responsible to establish each and every "land and water uses and activities subject to the Alaska coastal management program," districts necessarily may not write enforceable policies on matters not enumerated on one of these two lists. The colloquial term applied to this restriction is that district policies must "flow from" one of DNR's enumerated land and water uses and activities subject to the ACMP.

Per AS 46.40.040(a), DNR is also charged with developing <u>policies</u> applicable to the land and water uses subject to the ACMP, as well as <u>regulations</u> applicable to the land and water uses subject to the ACMP. The policies are set

forth in the state standards at 11 AAC 112, and the regulations are set forth at 11 AAC 114.250.

For example, the statewide standard at 11 AAC 112.200 (Coastal development) first sets out a mandatory prioritization program for districts in subsections (a) and (b), and then provides the statewide coastal development standard in subsection (c). That standard governs "the placement of structures and the discharge of dredged or fill material into coastal water." Since a district enforceable policy may flow only from those listed uses, activities, and impacts, a district policy may only regulate the discharge of dredge material into coastal water. A policy addressing the siting of dredge discharge on shoreline facilities would be disallowed. However, there are many district policies that could be written, such as when, how, and where the placement of structures and the discharge of dredged or fill material may occur into coastal water.

Under the 11 AAC 112.280, Transportation routes and facilities standard, a transportation route or facility will not be approved unless the applicant demonstrates compliance with the avoid, minimize, or mitigate sequencing process regarding the three listed impacts: alterations in surface and ground water drainage patterns, disruption in known or reasonably foreseeable wildlife transit, and blockage of existing or traditional access. A district could not write a policy governing some other aspect of a transportation route or facility, such as noise or protection of other non-listed habitats, as such a policy would not flow from the uses, activities, and impacts enumerated in that standard. Instead, to accomplish those goals, the district could designate the area meant to be protected as an important habitat, a recreational use area, a subsistence area, etc.

Subsection 5.3.4: Matters Regulated or Authorized by State or Federal Law

While the foregoing requires that district policies "flow from" enumerated state standards, districts may not adopt, duplicate, repeat, restate, or incorporate by reference a state standard or other state or federal law [AS 46.40.070(c)], and may not address a subject matter regulated or authorized by state or federal law unless it relates to a "matter of local concern." [AS 46.40.070(d)]. These requirements, while creating a regulatory tension, are not inconsistent. Rather, they are sideboards meant to leave open a discernable corridor for allowable district policies.

A district may not develop enforceable policies that address a matter regulated or authorized by state or federal law, unless the district can demonstrate the matter is a local concern under AS 46.40.070(a)(2)(C). Whether a matter is "regulated or authorized by state or federal law" refers to existing authority of a state or federal agency. The district must therefore analyze each intended district

enforceable policy to ensure not only that it "flows from" an enumerated state standard, but also ascertain whether the matter is already regulated or authorized by state or federal law.

Coastal districts may not write enforceable policies on matters regulated or authorized by DEC. See sections 5.1.3 and 6.6. A district may not write policies regarding any air, land or water quality issue potentially regulated by DEC (regardless of whether DEC has actually developed regulations on a given topic) because the Alaska legislature deliberately and explicitly carved DEC out of the process. HB 191 mandated that issuance of DEC permits, certifications, approvals, and authorizations establishes consistency with the ACMP. The regulation implementing AS 46.04.040(b), 11 AAC 112.310, was drafted to make clear that not only are matters DEC that actually regulates are matters about which districts could not write policies, but that any matter DEC could regulate (but has not yet done so), is also a matter about which a district could not write a policy.

These statutory and regulatory provisions were intended to set DEC apart from the other two resources agencies, DNR and DFG, which also have very broad regulatory authorities -- to regulate state lands, and to regulate the fish, wildlife, and aquatic plant species, respectively. Therefore, a district may not write a policy on DEC-regulated media (air, land, water quality), but under most circumstances, the district can write policies on DNR and DFG-regulated media (state lands and fish/wildlife/aquatic plant species), assuming they can meet the matter of local concern test.

Subsection 5.3.5: Matter of Local Concern

The next step in the analysis is whether the proposed policy passes the "matter of local concern" test. This test is triggered after the district demonstrates that its policy flows from a state standard, and that it addresses a matter already regulated by state or federal law. Under this scenario, the district policy will be allowed if it passes the "matter of local concern" test.

AS 46.40.070(a)(2)(C) defines a "matter of local concern" as:

a specific coastal use or resource within a defined portion of the district's coastal zone, that is

(i) demonstrated as sensitive to development;

(ii) not adequately addressed by state or federal law; and

(iii) of unique concern to the coastal resource district as demonstrated by local usage or scientific evidence.

Subsection 5.3.5.1: Sensitive to Development

This first prong of the test requires that the district "demonstrate" that a specific coastal use or resource is "sensitive to development" in order to write an enforceable policy. Unlike for designating areas, the regulations do not define what level of showing is required for a "demonstration" of "sensitivity," and will require a case-by-case analysis by DNR. However, while a "local usage" showing may be adequate in some cases to demonstrate resource sensitivity, it is likely that districts will often be required to meet its burden by producing scientific evidence demonstrating sensitivity, since resource sensitivity is often demonstrated by scientific evaluation rather than usage evaluation.

Subsection 5.3.5.2: "Adequately Addressed"

For a district to develop an enforceable policy on a matter already regulated or authorized by state or federal law, in addition to demonstrating that the specific use or resource is sensitive to development, the district must also demonstrate that the matter is not "adequately addressed" by that state or federal law.

If a state or federal agency has the statutory or regulatory authority to regulate a matter, then two scenarios arise in the determination of whether a given authority "adequately addresses" a matter. First, the statute or regulation may give an agency broad authority to regulate a matter, but may not address the particular matter about which a coastal district wants to write an enforceable policy. In this case, the matter would not be adequately addressed. Second, the district consider whether the statute or regulation is so broad or general that it is not sufficiently adequate to address the use, activity or impact the coastal district wants to manage. In this case, a coastal district could argue the matter is not adequately addressed, and write an enforceable policy that is more specific.

An example of a state standard that "inadequately addresses" a coastal use or resource is the coastal access standard at 11 AAC 112.220, which simply states, "Districts and state agencies shall ensure that projects maintain and, where appropriate, increase public access to, from, and along coastal water." The standard does not give specifics regarding how that access is to be increased, where the access is to be increased, or even what "public access" means. A district could argue that viewing the coastal waters is a form of "access" to them, and direct how and where viewing platforms are to be placed. In fact, since the state standard fails to do so, a district could define under what circumstances the standards of "maintaining" versus" "increasing" coastal access is "appropriate."

Another example might be the definition of "natural hazard" at 11 AAC 112.990(15), which does not include wind tunnels or wind shears as natural hazards. If no other state or federal law addresses the development of activities within these wind tunnel or shear zones, a district may be able to demonstrate that the state or federal law, including the natural hazard standard, does not adequately address the matter, and develop an enforceable policy to manage such activities within the wind tunnel or wind shear zones, as allowed under 11 AAC 112.990(15)(b).

Subsection 5.3.5.3: "Unique Concern"

The third prong of the matter of local concern test is that the use or resource is "of unique concern to the coastal resource district as demonstrated by local usage or scientific evidence." In establishing that a use or resource is of unique concern to the district, thereby allowing the district to write a policy on that matter which would otherwise be disallowed, local usage is an important and useful alternative to a district having to provide "scientific" justification.

The standard to establish "scientific evidence" in demonstrating "unique concern" is high. As more fully described in a subsequent response, "scientific evidence," defined at 11 AAC 114.990, requires:

> *facts or data that are*
> *(A) premised upon established chemical, physical, biological, or ecosystem management principles as obtained through scientific method and submitted to the office to furnish proof of a matter required under this chapter;*
> *(B) in a form that would allow resource agency review for scientific merit; and*
> *(C) supported by one or more of the following:*
> *(i) written analysis based on field observation and professional judgment along with photographic documentation;*
> *(ii) written analysis from a professional scientist with expertise in the specific discipline; or*
> *(iii) site-specific scientific research that may include peer-review level research or literature.*

By contrast, local usage is defined at 11 AAC 114.990(23): "current and actual use of a coastal resource by residents of the locality in which the resource is found." This is likely an easier test to meet, and was designed to allow districts unable to meet the scientific evidence test an alternative that would allow that district to write an enforceable policy on a matter deemed important to the district.

There are a variety of means by which a district can demonstrate local usage of resources. The district can submit transcripts or summaries from public hearings, meetings, or workshops; transcripts of personal interviews, photographic evidence, information from other state, federal or local plans, or documented surveys of use. The district must summarize the information and method of gathering and verifying the information in the resource inventory and resource analysis sections. The source of the information must be included in the bibliography and referenced in the resource inventory and analysis section.

Subsection 5.3.6: More Specific Versus More Stringent

As discussed in the previous subsection, matters regulated or authorized by state or federal law, including the state standards at 11 AAC 112, may be broad in nature and general in their application. As such, a district may be able to pass the matter of local concern test enumerated above, and thereby write an enforceable policy regarding the specific use or resource within their coastal district that is more specific than the state or federal law. Thus, a district enforceable policy can be more *specific* where the issue to be regulated is inadequately addressed by the existing law and relates to a uniquely local issue, but the policy may not be more *stringent*. This is an important distinction.

A policy is more specific when it adds more detail or clarifies the application of an existing state or federal law. Enforceable policies that are specific are acceptable, so long as they demonstrate that the matter addressed is a matter of local concern, as described above, and at AS 46.40.070(a)(2)(C) and 11 AAC 114.270. By contrast, more stringent enforceable policies provide a different measure of compliance for an existing state or federal standard. In other words, being more specific takes an existing broad standard that does not seek to cover an entire topic, and adds provisions or qualifications where the standard has not spoken.

For example, the following policy is more stringent than the state standard, as opposed to being more specific: Transportation routes and facilities must avoid all impacts to wildlife transit routes." The reason that this policy is more stringent is because it addresses an area already comprehensively covered by state law, namely the avoid, minimize, or mitigate standard. The proposed policy seeks to change the standard by requiring complete avoidance of impacts, rather than assessing the consistency of a given project with the defined avoid, minimize, or mitigate sequencing process and definitions. Thus, this proposed policy is not allowable as it proposes a more stringent standard than the existing avoid, minimize, or mitigate sequencing process and definitions.

Subsection 5.3.7: District Enforceable Policies and Uses of State Concern

See Section 4.2 for a full discussion of Uses of State Concern. Further to that discussion, a coastal district plan is required to describe the uses and activities that will be considered proper and improper within the district's coastal zone, including those uses of state concern. 11 AAC 114.260. A district may not develop, and DNR will not approve, a district enforceable policy that arbitrarily or unreasonably restricts or excludes a use of state concern. AS 46.40.060(a) and 11 AAC 114.270(e).

For example, a district seeking to exclude oil and gas exploration or development, mining, or any other activity affecting coastal uses within the district's coastal boundaries would have to justify that exclusion within the issues, goals and objectives chapter, the resource inventory, and the resource analysis. The resource inventory (11 AAC 114.230) must include a description of the "major land or water uses or activities that are or have been conducted or designated within or adjacent to the district; and … major land and resource ownership, jurisdiction, and management responsibilities…" For mining purposes, this would include an inventory of the existing mining claims and patents, and land ownership. In addition, the resource analysis (11 AAC 114.240) must include "…the present and reasonably foreseeable needs, demands, and competing uses for coastal zone habitats and resources…" If the use or activity sought to be excluded or restricted is one of state concern, then the district must provide ample justification for the exclusion or restriction within its district plan. Having complied with these criteria, a district could identify mining activities as improper uses within the coastal zone, and develop an enforceable policy that restricted or disallowed mining and mining activities.

Subsection 5.3.8: Relationship of the Coastal District Enforceable Policies to the 11 AAC 112 Statewide Standards

Subsection 5.3.8.1: Coastal development. 11 AAC 112.200

The coastal development standard applies only to development in or adjacent to coastal waters. District enforceable policies may be district wide or area specific. Despite the title of this section, 11 AAC 112.200 does not provide what a lay person might assume is a statewide standard on the districts' authority to regulate development in the coastal area. To the contrary, the standard does two things.

First, it sets forth a requirement that the districts prioritize the uses and activities in the coastal area based upon whether the uses are water dependent, water-related, or neither but without an inland alternative. It is simply a

requirement that the more water-dependent the use or activity, the higher priority it shall receive.

Second, the standard at 11 AAC 112.200(c) does provide a state standard from which district policies can flow, namely policies that address the placement of structures and the discharge of dredged or fill material into coastal waters**.** But authority under this standard is limited to those parameters: structures or discharge being placed in coastal waters (i.e., not on land).

Subsection 5.3.8.2: Natural Hazard Areas (11 AAC 112.210) and Natural Hazard Designations (11 AAC 114.250(b)

Districts may develop enforceable policies related to natural hazards, and may apply those policies to activities occurring in or, as provided for at 11 AAC 110.015, affecting an area designated in their district plan as a natural hazard area. The new standard allows coastal districts to both identify additional natural hazards not identified under 11 AAC 112.990(15) and designate natural hazard areas in their district plans. See 11 AAC 114.250(b).[4] Perhaps most importantly, the standard recognizes that municipalities retain their Title 29 zoning and building code authorities to address the project details of natural hazard mitigation measures.

11 AAC 114.250(b) specifies that the district may designate natural hazard areas in their district plan, and for those other natural processes or adverse conditions not included in the definition of natural hazards at 11 AAC 112.990(15), there must be a scientific basis for the designation. See 11 AAC 112.210(a) and (b). 11 AAC 114.990(40) defines scientific evidence to mean

> *facts or data that are*
> *(A) premised upon established chemical, physical, biological, or ecosystem management principles as obtained through scientific method and submitted to the office to furnish proof of matter required under this chapter;*
> *(B) in a form that would allow resource agency review for scientific merit; and*
> *(C) supported by one or more of the following:*
> *(i) written analysis based on field observation and professional judgment along with photographic documentation;*
> *(ii) written analysis from a professional scientist with expertise in the specific discipline; or*

[4] Note that the CZMA does not mandate the expansive standard contained in the original 6 AAC 80.050 or the broadened natural hazard standard in 11 AAC 112.210. The CZMA only requires that state coastal programs address a planning process for the issues of coastal erosion, flood areas, storm surge and similar coastal issues. 16 U.S.C. § 1455(d)(2)(I); 1452(2)(B); 15 C.F.R. §923.25. The CZMA and ACMP was never intended to be a statewide standard for seismic safety, structural building codes or the like.

(iii) site-specific scientific research that may include peer-review level research or literature.

As an example, a district could designate an avalanche path as a natural hazard area under 11 AAC 114.210(b) and write an enforceable policy that is applicable to that area. Since "snow avalanches" are included in the definition of natural hazards, the test of including the scientific basis and evidence for that designation within that policy would not apply. The district is still required to meet the requirements for the designation of the area, though, as discussed in detail in subsequent sections.

As another example, a district could designate a wind tunnel or wind shear area as a natural hazard area and write an enforceable policy that would apply to that area. In this instance, since wind is not a defined natural hazard under 11 AAC 112.990(15), the district would be required to provide the scientific basis and evidence as rationale for that designation.

Subsection 5.3.8.3: Coastal Access (11 AAC 112.220).

This standard applies to, from and along coastal waters. District enforceable policies may be district wide or area specific. The state standard is written broadly enough such that a coastal district could write more specific enforceable policies. For example, the district could list what appropriate access is in publicly-owned waterfront property, and under what circumstances it is appropriate to mandate increasing that access.

Subsection 5.3.8.4: Energy Facilities (11 AAC 112.230) and Energy Facilities Sites [11 AAC 114.250(e)]

This standard applies within the coastal area. District enforceable policies must relate to designated areas and the designations must be made in cooperation with the state.

Subsection 5.3.8.5: Utility Routes and Facilities (11 AAC 112.240)

The standard and district enforceable policies apply within the coastal area. District enforceable policies may be district wide or area specific. The 11 AAC 112.240 Utility Routes and Facilities standard discusses those routes and facilities located on the beaches and shorelines. However, coastal district utility route policies are not limited to beaches and shorelines. Assuming they meet the criteria at 11 AAC 114.270(h), districts may write enforceable policies on utility routes and facilities throughout the coastal area, even inland, since these policies would indeed

flow from the state standard. That standard requires that utility routes and facilities be sited inland unless the route or facility is water-dependant or water related, or no practicable inland alternative exists.

Subsection 5.3.8.6: Timber harvest and processing (11 AAC 112.250).

The Forest Resources and Practices Act (AS 41.17) is incorporated into the ACMP. A district may not write enforceable policies under this standard. Timber Harvest and processing is not included within the subject uses that provide the parameters for enforceable policies. However, there are some situations where activities are not regulated under the FRPA – the harvest of small amounts on private lands. FRPA activities are excluded from consistency reviews per AS 40.096(g)(2). But if indeed these scenarios are not addressed under FRPA, then the district may develop enforceable policies on these activities, but must then pass the matter of local concern test at 11 AAC 114.270(h) to do so.

Subsection 5.3.8.7: Sand and Gravel Extraction (11 AAC 112.260)

This standard and district enforceable policies apply only to coastal waters. District enforceable policies may be district wide or area specific.

Subsection 5.3.8.8: Subsistence (11 AAC 112.270) and Subsistence Use Designations [11 AAC 114.250(g)]

This standard and district enforceable policies only apply to designated subsistence areas, which can be within the coastal area. Under 11 AAC 114.250(g), a district may designate areas in which a subsistence use is an important use of coastal resources and designate such areas. The district's designation must be made in consultation with appropriate state agencies, federally recognized Indian tribes, Native corporations, and other appropriate persons or groups. A district may then, under 11 AAC 114.270, develop enforceable policies that will be used to determine whether a specific land or water use or activity will be allowed. However, because the state standard applies to areas designated by a district, and the state standard provides the specific criteria that apply to uses or activities within the designated area, a district does not have to write an enforceable policy in its plan.

While a statewide subsistence priority is not appropriate, a district subsistence priority in a designated area important for subsistence use is appropriate and encouraged. This is the entire reason for the lengthy requirements at 11 AAC 114.230 (resource inventory), 11 AAC 114.240 (resource analysis), and 11 AAC

114.250 (subject uses and designations), to require districts to comprehensively inventory, analyze, and designate the local uses and resources that require extra protection in the ACMP consistency review process.

The major sideboards to the districts' right to establish enforceable policies, including designation of a subsistence priority, is the "matter of local concern" test in AS 46.40.070(a)(2)(C) and the requirement that the policies "not arbitrarily or unreasonably restrict or exclude uses of state concern." As described above in this section, a district may establish an enforceable policy concerning a given coastal use or resource under the "matter of local concern" test as long as the district can demonstrate that the use or resource is sensitive to development, not adequately addressed by state or federal law, and of unique concern to the coastal resource district.

Subsection 5.3.8.9: Transportation Routes and Facilities (11 AAC 112.280)

This standard and district enforceable policies apply throughout the coastal area. District enforceable policies may be district wide or area specific. District enforceable policies may focus on transportation routes and facilities throughout the coastal area if they meet the criteria at 11 AAC 114.270(h).

Subsection 5.3.8.10: Habitats (11 AAC 112.300) and Important Habitat Designations [11 AAC 114.250(h)]

District enforceable policies are limited to addressing only those uses and activities identified in the state standards at 11 AAC 112.200 – 11 AAC 112.240, 11 AAC 112.260 – 11 AAC 112.280, and areas designated under 11 AAC 114.250(b) – (i). A district enforceable policy may address any aspect of the standards that are listed specifically within the standard. In this case, 11 AAC 112.300(b) identifies those aspects that apply to the management of the habitat types identified in (a) of the section. District enforceable policies may be written only for important habitat areas designated under 11 AAC 114.250(h) and 11 AAC 114.270. A district may not address habitat management goals other than those specified within each habitat type identified in the habitat standard.

For each habitat type under the habitat standard, district enforceable policies only apply to those areas designated by the district as important habitat areas. Under 11 AAC 114.250(h), there is a twofold test that has to be met before a habitat can be designated as important. The first part is that the use has to have a direct and significant impact on coastal water. The second is that the designated portions are shown by written scientific evidence to be biologically and significantly productive

habitat. 11 AAC 114.990(40) defines scientific evidence. Local knowledge is not included in the definition. The district enforceable policies must specifically address the special productivity of the important habitat for which the area was designated. For example, if a district wished to designate a portion of a riparian area as important habitat, it would have to demonstrate how that area is biologically and significantly productive. If a district wished to develop enforceable policies for that designated area, the district would have to demonstrate the issue is a matter of local concern.

Districts may use existing resources, maps and other planning efforts to begin the important habitat designation process. In justifying the designation of important habitat areas, the district may rely on existing information in other planning documents, to the extent the information is relevant and satisfies the designation requirements (i.e., (1) demonstrates that the use of the designated portions have a direct and significant impact on coastal water; and (2) the designated portions are shown to be significantly more productive than adjacent habitat). For example, DEC has designated "sensitive habitats" for purposes of regional oil spill contingency planning. The process used to designate these habitats was collaborative and exhaustive.

Practically, the districts may start the designation process with these other planning efforts, but will likely have to develop the rationale and answer the "test" questions independently. The maps or narrative descriptions of the designated areas would have to comply with the ACMP regulations at 11 AAC 114.200-290 and the mapping specification “DNR Mapping and Data Requirements for District Plans” (2004).

Districts may designate “important habitats” in the uplands. An “important habitat” is a portion or portions of those seven habitats listed in 11 AAC 112.300(c), that are either designated as an important habitat by DNR or the district under 11 AAC 114.250(h), or identified as state game refuges, state game sanctuaries, state range areas, or fish and game critical habitat areas under AS 16.20. So if a use of a portion of a river, for example, has a direct and significant impact on coastal water and can be shown to be significantly more productive than adjacent habitat, then that habitat can be designated as “important habitat” by the district – even if that portion of the river is significantly upland. The test is very stringent and meant to be limiting. A district will have to show how state and federal regulations are not adequately protecting these areas.

The Special Area Management Plan regulation at 11 AAC 114.400 specifically lists a “wetlands management plan” as an example of a special area management plan. 11 AAC 114.270(i) recognizes that special area management

plans approved by the former Coastal Policy Council meet the "sensitive to development" and "of unique concern to the coastal district" parts of the local concern test in AS 46.40.070(a)(2)(C). The district is still required to demonstrate that enforceable policies for the special management plan are not adequately addressed by state or federal law and that the enforceable policies meet the other requirements of AS 46.40.030 and AS 46.40.070. Thus, wetlands management plans are not per se prohibited. Districts should recognize, however, that wetlands are already highly regulated by the Army Corps of Engineers and the Environmental Protection Agency under the Clean Water Act as well as by the Department of Environmental Conservation who certifies compliance for wetlands fill permits under its regulations. Thus, a wetlands management plan may not adopt, duplicate, repeat, restate, or incorporate by reference a state standard or other state or federal law [AS 46.40.070(c)], or address a subject matter regulated or authorized by state or federal law unless it relates to a "matter of local concern." [AS 46.40.070(d)].

For example, a wetlands management plan that classifies wetlands into categories of higher and lower value and for each classification, whether mitigation of wetlands functions would be on site in kind, on site out of kind, off site in kind, or off site out of kind, would not be allowed. The reason is that wetlands are regulated under 11 AAC 112.300(a)(3) using the statewide avoid, minimize or mitigate standard. This is a matter regulated by the state, and a district could not write enforceable policies on that subject matter. The district could, of course, pursue a separate agreement with the U.S. Army Corps of Engineers.

DNR recognizes the unique character of Alaska's rivers, streams, and lakes, and has gone significantly beyond the basic CZMA requirements to include these areas. For example, the definition of rivers, streams, and lakes is not limited to water bodies having a direct and significant impact on coastal waters. Rather, the definition includes the portions of the river, streams, or lakes that are catalogued anadromous, or not catalogued anadromous but still determined by DNR to exhibit evidence of anadromous fish. Obviously, these ACMP-regulated water bodies extend well into the interior of the state.

The regulations provide the procedure for a district to designate an important habitat are within a riparian management area and develop enforceable policies applicable for that area, but in practice, a district meeting the criteria of approvability for these efforts will be very difficult. Procedurally, a district may designate an important habitat area in the manner provided for at 11 AAC 114.250(h), which includes the habitat types listed in 11 AAC 112.300(a)(1)-(8). Included within the "rivers, streams, and lakes" habitat type is the "riparian management area" under 11 AAC 112.300(c)(2). A district may, with appropriate

justification and rationale, designate an area of important habitat to include a subset of the riparian management area covered by the habitat standard, as it flows from the habitat type (8) rivers, lakes, and streams. The fact that the area happens to be within a riparian management area is irrelevant. Once an area was designated by a district, the district could write an enforceable policy for that area if it could demonstrate that the habitat of interest within the riparian management area is not adequately addressed by the habitat standard, and that the habitat is a matter of local concern. As to why this showing would be difficult, see the above discussion on the designation of areas, the rationale required for approval of such areas, and the discussion of the meaning and application of the term "adequately addressed."

Cataloguing an anadromous stream under AS 41.14.870 cannot be viewed as a substitute for the 11 AAC 114.250(h) important habitat designation process, thereby eliminating the district's need to demonstrate a direct and significant impact on coastal waters. It is true that cataloguing a stream anadromous necessarily establishes a direct and significant connection to coastal waters. But under 11 AAC 114.250(h)(1), for a district to designate an important habitat area, they must demonstrate not that the water has a direct and significant impact on coastal waters, but rather that the use of the designated portions for which the important habitat designation is sought does.

Thus, if a district wishes to designate some riparian area as an important habitat, it must demonstrate that the use of that especially productive area would have a direct and significant impact on coastal waters, which could in some cases be different than the cataloguing test. Also, mere cataloguing does not require proof of the second prong of the test 11 AAC 114.250(h) test, that the area is significantly more productive than adjacent habitat. So depending upon the special productivity of the habitat, combined with the use of that habitat having a direct and significant impact on coastal waters, the district may be able to "borrow" from the science that established anadromosity, but not necessarily.

There are several DFG statutes that generally deal with managing the fish, game, and aquatic species of the state, but few that deal specifically with invasive species. Those DFG statutes that do address (generally) invasive species include, but are not limited to, AS 16.05.020, AS 16.05.251, AS 16.05.255, AS 16.05.920, AS 16.05.921, and AS 16.05.940. To the extent that the existing laws do not adequately address invasive species management, there may be a means for a coastal district to address invasive species within the ACMP.

The most direct approach to invasive species management is through the habitat standard at 11 AAC 112.300(b)(5). This standard addresses rocky islands and sea cliffs, and requires that these areas be managed to "avoid the introduction of

competing or destructive species and predators." Note that a district could not write a policy making this standard more specific, even if the district felt it could pass the matter of local concern test, since 11 AAC 112.300(b)(5) is not one of the permissible standards from which policies can be written under 11 AAC 114.270(a)(1). However, to the extent these laws do not adequately address the management of invasive species, a district may be able to designate specific areas as important habitat areas under 11 AAC 114.250(h), and develop enforceable policies to do so. As an example, some invasive plants and animals (i.e., various plant species introduced into the southern U.S. waterways, zebra muscles in the Great Lakes, reed canary grass in Juneau's Duck Creek, etc.) can adversely affect the water flow, circulation patterns, or natural vegetation of the coastal waters or habitat types listed in 11 AAC 112.300. A district may be able to designate certain areas and develop enforceable policies that would address invasive species if they could demonstrate the effect the species would have on the listed management measures for the habitat. As discussed before, a district would first have to meet the test for a matter of local concern.

Further, invasive species could arguably be addressed under the natural hazards standard, since natural hazards are defined as "natural processes or adverse conditions that present a threat to life or property in the coastal area." Invasive species would appear to constitute natural processes that threaten property in the coastal area. Obviously, the natural hazard standard was not written from the perspective of protecting the coastal resources from the natural hazard, but rather of protecting the applicant from the natural hazard, by mandating various constraints and limitations to development due to safety issues. However, a district could argue that an invasive species is a natural hazard, flows from that standard, and as long as the policy passed the matter of local concern test, a policy could be written to protect the resources themselves from the invasive species.

Subsection 5.3.8.11: Air, Land and Water Quality (11 AAC 112.310)

Coastal district plans can not include any enforceable policies that address air, land or water quality. One of the major reforms of HB 191 was to effectuate the direct state implementation of DEC's air, land and water quality standards as originally mandated in 1979 and approved by OCRM. HB 191 specifically provides that DEC's air, land and water quality standards are the exclusive standards of the ACMP for those purposes. AS 46.04.040(b). DNR has applied this requirement in 11 AAC 112.310 (air, land, water quality) and 11 AAC 114.270(f) (district enforceable policies). Districts may not, for example, set different secondary containment requirements for bulk fuel tank farms or

contingency plan requirements for tank farms above or below the DEC's regulatory thresholds in AS 46.04.045.

To the extent DEC already regulates this matter[5], a district may not write a policy on erosion. However, erosion control policies may be written under the natural hazards standard in designated areas only to the extent that the policy concerns "siting, design, construction, and operation of the proposed activity to protect public safety, services, and the environment from potential damage…" 11 AAC 112.210. Under the newly amended 11 AAC 112.300(b)(9), important habitat designated under 11 AAC 114.250(h) must be managed for the special productivity of the habitat in accordance with 11 AAC 114.270(g), which is where a district may decide which uses are allowed. So erosion control measures, if they pertain to the special productivity of the habitat, are allowable. Erosion could be addressed in utilities as long as the erosion control measure does not address one of the concerns already listed in 11 AAC 112.240(b)(1)-(3). Erosion could be addressed in transportation routes as long as the erosion control measure does not address one of the concerns already listed in 11 AAC 112.280(1)-(3).

Also district enforceable policies may address the siting of facilities, with appropriate justification, in cases where DEC's statues or regulations do not address the siting of projects or facilities.

Subsection 5.3.8.12: Historic, Prehistoric, And Archeological Resources (11 AAC 112.320) and Designations For History or Prehistory [11 AAC 114.250(j)]

The state standard applies to activities occurring in, or as provided for at 11 AAC 110.015, affecting the area designated by the state within the coastal area. The district enforceable policies apply to activities occurring in, or as provided for

[5] See AS 46.03.710, "[a] person may not pollute or add to the pollution of the air, land, subsurface land, or water of the state." By regulation, see 18 AAC Chapters 70, 72, and 15. "A person may not conduct an operation that causes or contributes to a violation of the water quality standards set by this chapter." 18 AAC 70.010(a). "No person may conduct an operation which results in the disposal of wastewater into or upon the waters of the state or surface of the land without obtaining a waste disposal permit from the department under AS 46.03.100." 18 AAC 72.010(a). DEC regulates and requires a permit for both domestic and nondomestic wastewater discharges 18 AAC 72.010(a) and 500(a). DEC can and does perform these oversight functions through use of both site specific and general permits: "The department will, in its discretion, and on its own motion or upon application by any person, issue a general permit for activities that produce wastewater and that (1) require a permit under 18 AAC 72.010 or 18 AAC 72.500…" 18 AAC 72.900(a). Alaska has adopted EPA's general NPDES permit as the permit required under AS 46.03.100, as authorized under AS 46.03.110(e). "A person who conducts an operation which results in the disposal of wastewater into the water of the state need not apply under secs. 20 - 100 of this chapter if the disposal is permitted under an NPDES permit, and the department has certified the NPDES permit in accordance with secs. 130 - 170 of this chapter." 18 AAC 15.120(a).

at 11 AAC 110.015, affecting the area designated by a district, within the coastal area.

The regulations include a statewide historic, prehistoric and archeological resources standard at 11 AAC 112.320. Section 320 requires appropriate state agencies to designate areas of the coast that are "important to the study, understanding, or illustration of national, state, or local history or prehistory." District designated areas supplement the state standard, which implements the Alaska Historic Preservation Act in the coastal zone. Districts may designate additional areas under 11 AAC 114.250(i) and establish policies for those areas if the policies meet the "matter of local concern" test. Subsection (b) provides that projects in designated areas must comply with the Alaska Historic Preservation Act and its implementing regulations.

Subsection 5.3.8.13: Recreational Use Designations [11 AAC 114.250 (c)] and Tourism Use Designations [11 AAC 114.250(d)]

Subject to the requirements of 11 AAC 114.250(c) and (d), there is no state standard for recreation or tourism. Districts enforceable policies must relate to designated areas, and may be within the coastal area. If an area is designated as a recreation area due to the presence of biological features, then a recreation policy could be written that addresses those features provided there are no competing regulatory or statutory conflicts (i.e. hunting limits). However, the biological attributes need to be identified in the Resource Inventory and Analysis and the enforceable policy requirements at 11 AAC 114.270 must be met.

The regulation 11 AAC 114.250(c)(2) allows for the designation of areas of recreational use if the area has potential for recreational use because of physical, biological, or cultural features. The enforceable policy is applicable to activities occurring in, or as provided for at 11 AAC 110.015, affecting designated recreational or tourism use area. See 11 AAC 114.250 (c) and (d) for criteria for designating such areas. As well, each policy must meet the requirements of 11 AAC 114.270.

Note that the definition for an area which merits special attention (AS 46.40.210(1)(A)) includes the criteria for identification of "areas of unique, scarce, fragile or vulnerable natural habitat, cultural value, historical significance, or scenic importance." This provides some context for designating areas to protect scenic values.

Subsection 5.3.8.14: Fish and Seafood Processing Facilities and Sites [11 AAC 114.250(f)]

There is no state standard for fish and seafood processing facilities and siting. District enforceable policies apply to activities occurring in, or as provided for at 11 AAC 110.015, affecting the area of the coast designated as suitable for development of facilities related to commercial fishing and seafood processing.

Subsection 5.3.8.15: Avoid, Minimize, or Mitigate [11 AAC 112.990]

Because the term "avoid, minimize, or mitigate" is defined in at 11 AAC 112.990 and the term is used in some of the state standards (11 AAC 112.240, 11 AAC 110.270, 11 AAC 112.280, and 11 AAC 112.300), the matter is adequately addressed for those particular standards. A district may not, therefore, write a policy using or defining the sequencing process to "avoid, minimize, or mitigate."

A district may be able to add specificity to the definition of the discreet terms "avoid" or "minimize," though the window within which this would be possible is small. This is because the state standard completely defines the terms "mitigation" and "practicability," thereby disallowing district policies from adding specificity to either. Since neither "avoid" nor "minimize" are explicitly defined, technically, a district could add specificity to the definition of either of those terms.

However, the difficulty arises in that the district's refined definition may not effectively redefine the terms. In other words, in determining whether avoidance or minimization has occurred, the state standard is not left open as to degree; rather, the avoidance or minimization must have occurred "to the maximum extent practicable," and "practicable" is defined at 11 AAC 112.900(c). Therefore, for a district to define "minimize" as something other than "to reduce the amount, extent, size, or degree" would be a difficult task without adding qualifiers. For example, a proposed policy to define "minimize" as "to reduce in amount, extent, size, or degree, taking into account cultural, ecological, physical, and biological concerns" would in effect be redefining "practicable," which is not allowed.

Similarly, the district could not refine the terms contrary to a lay interpretation, which again would amount to an impermissible redefinition. For example, defining "avoidance" as a concept substantially different than "to prevent the occurrence of" or "to keep from happening" would offend the rules of basic regulatory interpretation, and would be stricken.

Within the context of a consistency review for a proposed project, a district may comment or propose alternative measures on how the project would achieve consistency with the avoid, minimize, or mitigate requirements of the standard.

Subsection 5.3.9: Designation of Areas and Enforceable Policies Applicable to Those Areas

The regulations at 11 AAC 114 allow a district to designate an area for the uses and activities listed in 11 AAC 114.250(b)-(i). There are four benefits of designation: (1) the district's ability to write enforceable policies to manage uses and resources within or, as provided for at 11 AAC 110.015, affecting the designated areas; (2) the district's authority to identify proper and improper uses within the area under 11 AAC 114.260; (3) the district's authority to identify what uses are to be allowed and disallowed under 11 AAC 114.270(g); and (4) the district's entitlement to appropriate due deference (discussed previously) during a consistency review when activities are proposed within duly designated areas. These benefits may not apply to all districts, and their value can only be addressed by each district after considering its particular reasons for designating an area.

OCRM has recently clarified the authority of a state or district to designate an area on federal land and develop enforceable policies applicable to those federal lands. This is an important topic that hinges on a key distinction: state standards, and the district policies that flow from those state standards, cannot be written to apply directly to federal lands. Rather, state and district policies and designations must be created to apply only to areas within the state's jurisdiction and to the uses or resources of the state's coastal zone. These state and local policies can then apply on federal lands through the state's CZMA federal consistency review authority when an activity on the federal lands will affect any uses or resources of the states coastal zone. District enforceable policies developed for a designated area may address and be applied to uses or activities that are occurring within the boundaries of that designated area, or as provided for at 11 AAC 110.015, affecting the uses or resources of the that designated area. Thus, a state or district may not establish *designations* on federal lands, but the enforceable policies developed for those designated areas may be applicable to activities occurring on federal lands.

The reason why a state or district cannot designate areas (such as a subsistence use area) on federal lands is that the CZMA regulations at 15 CFR 923.21 limit a state's ability to designate areas of particular concern (here, district designations) to the coastal zone. However, the CZMA explicitly excludes federal lands from the definition of coastal zone. [16 U.S.C. § 1453(1): "Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of which is held in trust by the Federal Government, its officer or agents."] Therefore, a district plan may inventory the coastal resources on federal lands, and may perform its resource analysis noting that the coastal resource extends to the federal lands within the district (e.g., caribou migration on the North Slope onto

ANWR), but may not designate ANWR as a subsistence use area in which the district's policies or the state subsistence standard will be applied.

However, those state standards and district enforceable policies that are not implemented through or require a designated area *do* apply to activities occurring on those federal lands, as a part of federal consistency. There are two reasons for this. First, any federal agency activity that "affects any land or water use or natural resource of the coastal zone shall be carried out in a manner that is consistent to the maximum extent practicable with the enforceable policies of [the state]." 16 USC 1456(c)(1) and 15 CFR part 930, subpart C. Second, an applicant that requires a listed federal authorization for an activity affecting any land or water use or natural resource of the coastal zone shall certify that the "proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program." 16 USC 1456(c)(3)(A)and 15 C.F.R. 930 part 930, subpart D. Thus, where an activity occurs on federal lands, even though that land is technically outside the "coastal zone," the *effects* of that activity may affect land/water uses or natural resource *of* the coastal zone, in which case the federal consistency process must apply the state standards and applicable district enforceable policies.

For example, if a caribou herd migrates across state/district lands, the caribou is a "resource" of the state's coastal zone. If the caribou are also hunted for subsistence, the hunting of the caribou is a "use" of the coastal zone. If the caribou migrate on to federal land within the coastal area and a Federal agency activity (e.g., a federal lease sale) or a federal license or permit activity (e.g., an application to drill an oil well), is proposed for that federal land and the proposed activity will have reasonably foreseeable effects on the caribou (whether the caribou are on state land or federal land), then the proposed activity must be consistent with the applicable state and district policies, through the CZMA federal consistency review process. In this example, the Energy Facilities standard at 11 AAC 112.230, and other standards applicable throughout the state's coastal zone, would apply, but a district would not be allowed to designate an area or develop policies specific to activities on those federal lands.

Recall that, pursuant to 11 AAC 114.270(a)(1), district policies may only address two categories of uses:

- uses and activities identified in 11 AAC 112.200 - 11 AAC 112.240 and 11 AAC 112.260 - 11 AAC 112.280; and
- areas designated under 11 AAC 114.250(b) - (i).

Using the foregoing analysis, district policies written under both categories must apply to areas within district and/or state jurisdiction and may not be written

to apply specifically to federal lands. In accordance with 11 AAC 110.015, district enforceable policies written under both categories may be applicable to federal lands under the CZMA federal consistency process, provided the potential effects to the uses or resources of the designated area can be substantiated and demonstrated during the consistency review.

The process for completing the designation of areas involves several steps, discussed in detail as follows.

Subsection 5.3.9.1: Organization of designated area information

Each designation should be separately delineated in the enforceable policies section, the resource inventory section, and the resource analysis section. However, as more fully described below, designation of areas are distinct from enforceable policies. This is an important point, as the two involve different procedures and qualifications. Hence, a reader may query why the guidance above, referring only to the designation of areas, states that designations should be listed in the enforceable policies section, even though they are not enforceable policies.

The reason that OPMP urges districts to *list* the approved designated areas in the district enforceable policy section of a plan (even though they are not enforceable policies) is to protect the district's interests during a consistency review. When an applicant, coordinating agency or any other reviewing or commenting entity refers to the district plan to ascertain whether any district enforceable polices apply to the project, there is the possibility that these referring entities may not know to separately check a separate "designated areas" section. A designated area, while not a policy itself, is still "an enforceable component of the district plan." 11 AAC 114(g). This listing is particularly important for those areas designated by a coastal district that are to be used in concert with the subsistence, natural hazards, or important habitats state standards, since the district is relying upon the state standard as its enforceable policy in that designated area, rather than having written a district-specific policy.

Thus, a district that lists the designated areas in its enforceable policies section will alert reviewers of the existence of the areas, thereby assuring that the district receives appropriate due deference during a consistency review when activities are proposed within the areas. Districts should include in the enforceable policies section a statement or listing of the areas designated, divided into subject groupings (e.g., "the district has designated X as shown on map Y as a natural hazard area"), thereby illustrating that the areas listed are not themselves enforceable policies, but are listed as an aid to readers in identifying the areas in which the district must still be afforded due deference.

The description, justification, and location/boundaries of the designated area should be in the resource inventory and analysis section of the district plan. The description and justification should be a section with a descriptive heading at the end of the resource inventory and analysis section. The location and boundaries of any designated areas must be clearly described or mapped at a scale sufficient to determine whether a use or activity is located within the designated area. This description can be in the resource inventory and analysis, or a map can be included elsewhere in the plan. If the designated area is mapped, the resource inventory and analysis sections and the enforceable policies section should reference the map. If the designated area is only described but not mapped, the enforceable policies section should reference the appropriate page and section within the resource inventory and analysis. The designated areas and applicable enforceable policies must be included within the enforceable policies section of the plan.

As an example, if a district designates a natural hazards area, and intends that only the state Natural Hazards standard at 11 AAC 112.210 apply to that designated area, then the following language within the enforceable policies section would be appropriate, under a heading reading "Designated Areas":

> "The X Borough has designated five natural hazard areas within its district boundary, depicted on Map N (areas N1, N2, N3, N4, and N5). The resource inventory and analysis chapter, pages 15-20, includes the justification for these designations and the specific natural hazards of concern for each designation. The state standard at 11 AAC 112.210 applies within these designated areas. There are no additional district enforceable policies applicable to the natural hazard areas depicted on Map N."

Subsection 5.3.9.2: OPMP criteria and process for approval of designated areas

The following general parameters are applicable to all to subject uses within designated areas:

- For those subject uses and activities identified in 11 AAC 114.250(b)-(i) (natural hazards, recreational use, tourism use, major energy facilities sites, commercial fishing and seafood processing facilities, subsistence use, important habitat, and history and prehistory sites), a district must have designated the area for the state standards to apply, as applicable, or for the district to develop enforceable policies applicable to that area.
- Designations are not allowed on federal land.
- The area must be described or mapped at a scale sufficient to determine whether a use or activity is located within the area. 11 AAC 114.270(g).

- The maps must follow the DNR Mapping and Data Requirements for District Plans.
- The district plan must list the designated areas within the enforceable policies section of the plan (with appropriate references to the description or map of the location).
- The district plan must include enforceable policies that apply to areas designated for recreational use; tourism use; major energy facilities; commercial fishing and seafood processing facilities; and history and prehistory areas, if the district designates any of these areas.
- Information in the resource inventory must be substantiated or documented with a citation or reference to the source of that information
- If inventory information is contained in another published source, the relevant information must be sufficiently summarized, referenced in the district plan, and made available upon request
- The resource analysis must include an analysis of the impacts of uses and activities on important habitats and resources
- The resource analysis must describe present and reasonably foreseeable needs, demands, and competing uses for coastal zone habitats and resources; suitability of habitats; suitability for development; sensitivity to development; and potentially or reasonably foreseeable conflicts among coastal zone uses and activities.

An important component of general guidance on designating areas is the applicability and use of "scientific evidence." In developing designated areas, districts should note that only designations of areas for *natural hazards* and *important habitats* require scientific evidence as justification. See 11 AAC 112.210(a) and 11 AAC 114.250(h)(2). The definition of "scientific evidence" at 11 AAC 114.990 is:

> *"facts or data that are*
>
> *(A) premised upon established chemical, physical, biological, or ecosystem management principles as obtained through scientific method and submitted to the office to furnish proof of a matter required under this chapter;*
>
> *(B) in a form that would allow resource agency review for scientific merit; and*
>
> *(C) supported by one or more of the following:*
>
> *(i) written analysis based on field observation and professional judgment along with photographic documentation;*
>
> *(ii) written analysis from a professional scientist with expertise in the specific discipline; or*

(iii) site-specific scientific research that may include peer-review level research or literature;"

For those two area designations requiring scientific evidence (natural hazards and important habitat) the district must provide scientific evidence justifying the designation in the resource inventory and analysis, or must reference the source of the facts or data which would then be included in the submission documents for the plan amendment. The references must include a bibliography as an appendix in the district plan, or located at the end of the resource inventory/analysis chapters.

With these general conditions as a base, the following sections provide more specific guidance and criteria for approval for each type of designation allowed under 11 AAC 114.250(b)-(i).

Natural hazard areas [11 AAC 114.250(b)]

- The designation must be within the coastal area.
- The description of the likelihood of occurrence of the natural hazard (i.e., what the possibility is that the natural hazard might occur) must be included in the resource inventory and resource analysis sections of the coastal district plan.
- For natural hazards defined in 11 AAC 112.990(15)(A) (i.e., flooding, earthquakes, active faults, tsunamis, landslides, volcanoes, storm surges, ice formations, snow avalanches, erosion, and beach processes), documentation must be based on either scientific evidence or local usage.
- Other natural hazard areas *not* included in the definition at 11 AAC 112.990(15)(A) must include the scientific basis for designating the natural process or adverse condition as a natural hazard, along with supporting scientific evidence for the designation of the area. For example, a coastal district may wish to designate an area that is vulnerable to "wind shear" as a natural hazard area. The scientific basis for the designation of the wind shear area must be included in the resource inventory and resource analysis sections of the coastal district plan. The scientific evidence for the designation of that process within that area would document the existence of the hazard in that particular location.
- Must meet the "matter of local concern" criteria at 11 AAC 114.270(d), (e), and (h), since enforceable policies within this designated area would address subject uses that are also state standards.
- Does not require a district enforceable policy, because state standards provide that the designation can be made by the state *or* by a coastal district.

Recreational use areas [11 AAC 114.250(c)]

- The resource inventory and resource analysis sections of the coastal district plan must include documentation that the area receives significant use by persons engaging in recreational pursuits. Significant use generally means "important, of consequence" to the coastal district.
- The resource inventory and resource analysis sections of the coastal district plan must include documentation that the area has potential for recreational use because of physical, biological or cultural features.
- The designation must be within the coastal area.
- Since there is no state standard for this use, a designation in this area need *not* meet the "matter of local concern" test, unless a proposed enforceable policy addresses a matter regulated or authorized by some other state or federal law not enumerated in 11 AAC 112.
- Requires that a district enforceable policy be written applicable to this area, because there are no state standards that address this use. Thus, the district must develop enforceable policies to be used in concert with the designation of that area to provide the management measures for addressing uses or activities within the area, or as provided for at 11 AAC 110.015, affecting the area.

Tourism use areas (11 AAC 114.250(d)

- The resource inventory and resource analysis sections of the coastal district plan must include documentation that the area receives or has the potential to receive significant use by the visitor industry using cruise ships, floatplanes, helicopters, buses or other means of conveying groups of persons to and within the area.
- The designation must be within the coastal area.
- Since there is no state standard for this use, a designation in this area need *not* meet the "matter of local concern" test, unless a proposed enforceable policy addresses a matter regulated or authorized by some other state or federal law not enumerated in 11 AAC 112.
- Requires that a district enforceable policy be written applicable to this area, because there are no state standards that address this use. Thus, the district must develop enforceable policies to be used in concert with the designation of that area to provide the management measures for addressing uses or activities within the area, or as provided for at 11 AAC 110.015, affecting the area.

Major energy facilities sites [11 AAC 114.250(e)]

- The designation must apply to major energy facilities as defined in 11 AAC 112.990(14).
- The designation must be located within the coastal area.
- The major energy facility must be for a development of more that local concern. More than local concern means regional, state or national concern.
- The designation must be in cooperation with state agencies. This means the coastal district must consult with and receive approval from the state agencies for the designation prior to its inclusion in the district plan. The district plan must summarize and document the process and results of this cooperation in the district plan.
- Must meet the "matter of local concern" criteria at 11 AAC 114.270(d), (e), and (h), since enforceable policies within this designated area would address subject uses that are also state standards.
- Requires that a district enforceable policy be written applicable to this area, because there are no state standards that address this use. Thus, the district must develop enforceable policies to be used in concert with the designation of that area to provide the management measures for addressing uses or activities within the area, or as provided for at 11 AAC 110.015, affecting the area.

Commercial fishing and seafood processing facilities sites [11 AAC 114.250(f)]

- The designation must be within the coastal area.
- The resource inventory and resource analysis sections of the coastal district plan must include documentation that the area is suitable for the location or development of facilities related to commercial fishing and seafood processing.
- Since there is no state standard for this use, a designation in this area need *not* meet the "matter of local concern" test, unless a proposed enforceable policy addresses a matter regulated or authorized by some other state or federal law not enumerated in 11 AAC 112.
- Requires that a district enforceable policy be written applicable to this area, because there are no state standards that address this use. Thus, the district must develop enforceable policies to be used in concert with the designation of that area to provide the management measures for addressing uses or activities within the area, or as provided for at 11 AAC 110.015, affecting the area.

Subsistence use areas 11 AAC 114.250(g)

- The designation must be within the coastal area.
- The resource inventory and resource analysis sections of the coastal district plan must include documentation that the designation is in an area in which a subsistence use is an important use of the coastal resources. The coastal district must describe and justify what it considers an "important use" and why the use is important to the district. The "local usage" option would be appropriate and helpful for the district to make this showing.
- Designations may not be located in areas identified under AS 16.05.258 as nonsubsistence areas.
- The coastal district must consult with appropriate state agencies, federally recognized Indian tribes, Native corporations, and other appropriate persons or groups prior to the designation of subsistence use areas. The district plan must summarize and document the process and results of this consultation in the district plan.
- Must meet the "matter of local concern" criteria at 11 AAC 114.270(d), (e), and (h), since enforceable policies within this designated area would address subject uses that are also state standards.
- Does not require a district enforceable policy, because state standards provide that the designation can be made by a coastal district.

Important habitat areas [11 AAC 114.250(h)]

- The designation must be within the coastal area
- Designations may designate portions of the habitats listed in 11 AAC 112.300(a)(1)-(8) (offshore areas, estuaries, wetlands, tideflats, rocky islands and seacliffs, barrier islands and lagoons, exposed high-energy coasts, and rivers, streams and lakes). Each of these habitats are defined at 11 AAC 112.990.
- Importantly, this list is not exclusive, as 11 AAC 114.250(h) allows for a district designating "other habitats in the coastal area," as long as the requisite showings from 11 AAC 114.250(h)(1) and (2) are established.
- Under 11 AAC 114.250(h)(1), the designated area must have a direct and significant impact on coastal water (see the following section discussing the meaning and applicability of the "direct and significant impacts" test).
- Under 11 AAC 114.250(h)(1), the designated area must be shown by written scientific evidence to be significantly more productive than adjacent habitat (see the following section discussing the definition and requirements for an adequate scientific evidence demonstration).

- Must meet the "matter of local concern" criteria at 11 AAC 114.270(d), (e), and (h), since enforceable policies within this designated area would address subject uses that are also state standards.
- Does not require a district enforceable policy, because state standards provide that the designation can be made by the state *or* by a coastal district.

Important history or prehistory areas [11 AAC 114.250(i)]

- The resource inventory and resource analysis sections of the coastal district plan must include documentation that the designated area is important to the study, understanding, or illustration of national state or local history or prehistory. Note the state standard includes natural processes as criteria for designation by the state, and the subject use guidance for districts does not include these criteria.
- The designation must be located within the coastal area.
- Must meet the "matter of local concern" criteria at 11 AAC 114.270(d), (e), and (h), since enforceable policies within this designated area would address subject uses that are also state standards.
- Requires that a district enforceable policy be written applicable to this area, because there are no state standards that address this use. Thus, the district must develop enforceable policies to be used in concert with the designation of that area to provide the management measures for addressing uses or activities within the area, or as provided for at 11 AAC 110.015, affecting the area.

Subsection 5.3.10: Direct and Significant Impacts

Within 11 AAC 114, a coastal district may expand their inland coastal district boundary or designate an important habitat area if the district can demonstrate that the use of or activity within the particular area will have a direct and significant impact on coastal waters. A "direct and significant impact," as used in 11 AAC 112 and 11 AAC 114, is defined at 11 AAC 114.990(13) [note that a different definition is used for application of the term in 11 AAC 110, as provided at 11 AAC 110.990(b)]. For purposes of districts writing enforceable policies, the 11 AAC 114 definition applies, and provides that a direct and significant impact is

> *an effect of a use, or an activity associated with the use, that will proximately contribute to a material change or alteration of the coastal waters, and in which*
>
> *(A) the use, or activity associated with the use, would have a net adverse effect on the quality of the resources;*

(B) the use, or activity associated with the use, would limit the range of alternative uses of the resources; or

(C) the use would, of itself, constitute a tolerable change or alteration of the resources but which, cumulatively, would have an adverse effect.

Note that establishing a direct and significant impact involves a two-part test. First, there must be a showing that an effect of a use or activity will contribute to a material change or alteration of the coastal waters. After establishing the first prong, then there must be a second showing that a use or activity would have an adverse effect on the quality or range of alternative uses of the coastal resources. In establishing this second prong, biological resources are an important factor to consider. In determining whether the use or activity would have a net adverse effect on the quality or range of alternative uses of the resources, the "resources" affected may be biological resources. AS 46.40.210(3) defines coastal use or resource as "a land or water use or natural resource of the coastal zone" and includes "subsistence, recreation, public access, fishing, historic or archaeological resources, geophysical resources, and biological or physical resources found in the coastal zone on a regular or cyclical basis." Assuming that the first prong of the test is met (that an effect of a use or activity will contribute to a material change of the coastal waters), then in determining the second prong (whether a use or activity would have an adverse effect on the quality or range of alternative uses of the resources), biological resources are to be considered.

Establishing the second prong of the test involves more than a simple showing of "impact" to the resource. First, the impact must be "adverse." Second, the adverse impact must adversely affect the "quality" of the resource, or would "limit the range of alternative uses of the resource." These requirements are highlighted by the cumulative impact option at 11 AAC 114.990(13)(C), which is premised upon the notion that there may be a "tolerable change or alteration of the resources." In other words, just having a change or alteration of the resources is not sufficient to pass the test, as simple changes may be "tolerable." Rather, the impacts must be proven to be "adverse." As to the cumulative impacts option, considering the many contributing factors that impact resources over time, the scientific proof involved to demonstrate a cumulative impact analysis may be difficult. Still, the power to utilize cumulative impacts as passing the direct and significant impact test is still a powerful and important option.

Subsection 5.3.11: Developing District Enforceable Policies – A Decision Tree

To summarize the process for a district to develop and enforceable policy that is ultimately approvable by DNR, OPMP created a "decision tree" with

questions, answers, and directions for the development of an enforceable policy. The "decision tree" questions, answers, and directions are included below.

While the statutes and regulations are controlling regarding the content and approvability of district enforceable policies, districts are encouraged to use the following "decision tree" in the development of their policies. The "decision tree" should quickly summarize whether DNR will likely approve the policy.

1. Does the matter to be addressed in a district enforceable policy flow from the state standards or designated areas as listed at 11 AAC 114.250 (a) or (b)-(i)?

   If no, stop. A district may not write an enforceable policy to address this matter. Go to 12.
   If yes, go to 2.

2. Is this a matter Department of Environmental Conservation (DEC) has the authority to regulate?

   If yes, stop. A district may not write an enforceable policy to address this matter. Go to 12.
   If no, go to 3.

3. Does the enforceable policy apply within a designated area, Area Which Merits Special Attention (AMSA) or Special Area Management Plan (SAMP)?

   If yes, the district may write an enforceable policy including those that specify whether a use or activity is allowed. Go to 4.
   If no, the district may write enforceable policies except for those that specifically allow or disallow a use or activity. Go to 4.

4. Does the enforceable policy, which was permitted under 3, flow from the following state standards: Coastal Development, Coastal Access, Energy Facilities, Utility Routes and Facilities, Sand and Gravel Extraction, or Transportation Routes and Facilities?

   If yes, review the state standard then go to 5.
   If no, review the appropriate designation under 11 AAC 114.250 (b)-(i). Go to 8.

5. Can a district write a policy that flows from, or fits within the limits of the language or specific requirements in the state standard?

If yes, go to 6.
If no, the district can't write the enforceable policy. Go to 12.

6. Does the enforceable policy address a matter of local concern? [Yes, if the district can meet the requirements AS 46.40.070(a)(2)(C)(i), (ii) and (iii). (If the district is within an existing AMSA or SAMP approved prior to 5/21/03, the district does not have to meet parts i and iii of the requirements) (i): demonstrate the coastal use or resource is sensitive to development; (ii): show the matter is not adequately addressed by state or federal law (including the state standard); and (iii): show the matter is of unique concern to the coastal resource district as demonstrated by local usage or scientific evidence.]

   If yes, go to 7.
   If no, stop. The district may not write an enforceable policy to address this matter.Go to 12.

7. Can the district show the matter is not adequately addressed by state or federal law (including the statewide standards)? [This means the state or federal agency either a) doesn't have the authority to regulate the matter, or b) does have the statutory authority to regulate the matter, but either doesn't have implementing regulations or the statute or implementing regulations either don't address the matter or are too general or vague.]

   If yes, the district may write an enforceable policy. Go to 11.
   If no, stop. The district may not write an enforceable policy to address this matter. Go to 12.

8. Is the matter related to a subject use listed under 11 AAC 114.250(b) natural hazards, (g) subsistence, or (h) important habitats?

   If yes, the district may designate the area, but does not have to write an enforceable policy. The state standard applies to the designated area. The designated area must be described or mapped at a scale sufficient to determine whether a use or activity is located within the area. If the distrcit wishes to write an enforceable policy, go to 5.
   If not, go to 9.

9. Is the matter related to a subject use listed under 11 AAC 114.250 (c) recreational use, (d) tourism use, (e) major energy facilities sites, (f)

commercial fishing and seafood processing facilities sites or (i) historic or prehistoric sites?

If yes, go to 10.
If no, stop. The district may not write an enforceable policy to address this matter. Go to 12.

10. Is the matter regulated by state or federal law?

If yes, go to 6.
If no, go to 11.

11. Is the enforceable policy clear, concise, as to the activities and persons affected by the policy and the requirements of the policy? Does it use precise, prescriptive and enforceable language? Does it NOT arbitrarily or unreasonable restrict or exclude uses of state concern? Does the enforceable policy NOT repeat, restate, or incorporate by reference a state or federal law? Is the enforceable policy more specific that a state or federal law, but not more stringent? Does the enforceable policy NOT address a matter regulated by DEC? If the policy applies to a specific location or designated area, is the description or map developed at a scale sufficient to determine whether a use or activity is located within the area? Does the district plan document by local usage or scientific evidence a use or resource of unique concern that is the subject of an enforceable policy?

If yes to all of the above, the enforceable policy is likely to be approved by DNR.
If no to any of the above, DNR cannot approve the proposed language.

12. Even though a district may not write an enforceable policy, the district can and should comment on an activity subject to ACMP consistency review per 11 AAC 110 if the district is an "affected" coastal district. Distrcits can review the activity against the state standards, consider the resource inventory and analysis information included in the district plan, and propose alternative measures as appropriate. Districts may also consider information from other sources, such as scientific evidence or local knowledge, when writing consistency comments. When considering consistency comments and affording due deference, the coordinating agency considers the commentor's expertise or area of responsibility and all the evidence available to support any factual assertions of the commentor.

Section 5.4: State Designation of a Geographic Location Description

Chapter 6 describes in detail the consistency review process and those activities that are subject to the consistency review provisions of the ACMP. As described in that chapter, the state has established in AS 46.40.096(*l*) that the consistency review provisions of 11 AAC 110 apply to

> *(1) activities within the coastal zone; and*
> *(2) activities on federal land, including the federal outer continental shelf, that would affect any land or water use or natural resource of the state's coastal zone; for purposes of this paragraph, those activities consist of any activity on the federal outer continental shelf and any activity on federal land that are within the geographic boundaries of the state's coastal zone notwithstanding the exclusion of federal land in 16 U.S.C. 1453(1).*

Effectively, this establishes the geographic purview of the ACMP, known in federal terms as the "Geographic Location Description," or "GLD." 15 C.F.R. 930.34(b) and 930.53(a)(1). Therefore, the state has already identified all lands and waters in the geographic boundaries of the state's coastal zone, as well as the federal outer continental shelf as a GLD. For federal agency activities, GLD's described under 15 C.F.R. 923.34(b) provide notice to federal agencies that the state believes federal agency activities proposed for the GLD are likely to have coastal effects. Similarly, federal license or permit activities listed within the state's coastal program are subject to the consistency review process if they occur within the state's coastal zone or GLD.

While a coastal district may not establish designated areas on federal lands, nor modify the state's approved GLD, a coastal district may request that the state further refine the general GLD to identify a subset area important for a coastal use or resource. The state would be required to submit that GLD modification as a formal request to OCRM for an ACMP program change. While this is a matter the state may or may not embrace, the district should work with the state if they feel a subset area of the GLD should be formally designated and described, and prepare the justification and rationale for that subset area as described above for a designated area (see subsection 5.3.9). That justification and rationale must show that effects from listed federal license or permit activities located in the geographically described location will have reasonably foreseeable effects on the uses identified by the coastal district for that area.

Section 5.5: Application of Enforceable Policies and Statewide Standards to Federal Consistency Reviews

In order to accommodate the CZMA "effects test" for federal consistency reviews, 11 AAC 110.015 was added to the ACMP regulations. That regulation reads:

> *For the purposes of a consistency review conducted under 16 U.S.C. 1456 for a project requiring a federal consistency determination or federal consistency certification, in accordance with the applicable provisions of 15 C.F.R. Part 930 and of the program, and notwithstanding a contrary provision of 11 AAC 112 or 11 AAC 114, a project within or affecting land or water uses or natural resources of the coastal zone is subject to the state standards in 11 AAC 112.200 - 11 AAC 112.990 and to applicable enforceable policies of a district coastal management plan approved under 11 AAC 114. Except as provided in 15 C.F.R. 930.54 and 11 AAC 110.400(c), federal license or permit activities that occur inland of the state's coastal zone boundary are not subject to a consistency review under this chapter.*

This language addresses how the enforceable policies of a coastal district and the statewide standards are applied to activities. Activities that are subject to the federal consistency requirements (i.e., a federal agency activity or a listed federal license or permit activity) are subject to the state standards and applicable district enforceable policies if the project is within the coastal zone, or that activity is located outside the coastal zone but the impacts of that activity would affect the uses or resources within the coastal zone. This is federal "effects test" is also applicable to activities that occur within a designated area, or that are located outside a designated area but the impacts of the activity would affect the uses or resources of the designated area.

Section 5.6: Additional Documents and Components of the ACMP

In addition to the state agency authorities, state standards at 11 AAC 112, and the coastal district plans identified in Sections 5.1, 5.2, and 5.3 of this chapter, the following documents are also incorporated into the ACMP. These documents improve the coordination, communication, and cooperation for ACMP related issues.

1. List of Expedited Consistency Reviews and State Authorizations Subject to the ACMP – as revised on May 24, 2004
2. Joint EPA/State of Alaska Procedures for Coastal NPDES Permit Reviews – October 1986

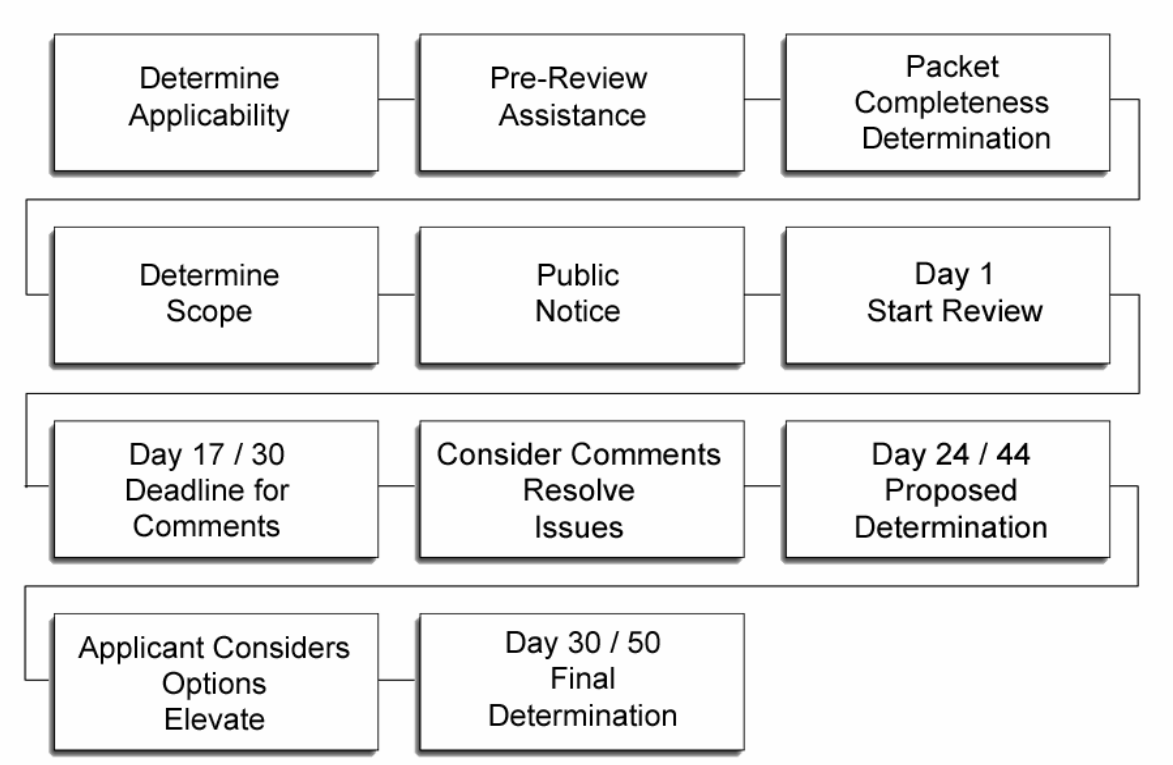
3. MOA Between the ADNR and the DGC, OMB – DGC/OMB Concurrence of ADNR Disposals in the Coastal Area – October 22, 1986
4. MOU Between EPA/State of Alaska DEC – 1991
5. MOU With the Federal Aviation Administration – August 19, 1994
6. MOU Between SOA/DGC and USDI/MMS Alaska OCS Region – May 3, 1995
7. MOU Between the SOA and Western Federal Land Highway Division – June 1996
8. Partnership Agreement Between ADGC and USACE, Alaska District – May 1997
9. MOU Between SOA and USDA/USFS, Alaska Region on Coastal Zone Management Act/Alaska Coastal Management Program Consistency Reviews – March 2000

Chapter 6: The Consistency Review Process of the ACMP

The ACMP consistency review process at 11 AAC 110 is the primary means by which proposed coastal uses and resources are evaluated for compliance and consistency with the ACMP enforceable policies. As such, the consistency review process is the keystone component of the ACMP that coordinates the application of the state's enforceable policies, brings all relevant ACMP participants to the table, and establishes the authorities, responsibilities, and opportunities for participation in the review of proposed coastal projects.

This chapter will analyze the general consistency review process of 11 AAC 110 and discuss in detail the various factors important for successful implementation of the ACMP consistency review process. However, not every facet or component of the consistency review process will be discussed in this chapter. Rather, 11 AAC 110 should be consulted for the detail, specifics, and nuances of the consistency review process.

In general, the following flow chart illustrates the general procedures and milestones associated with the consistency review process.



Section 6.1: Applicability of the ACMP Consistency Review Process

11 AAC 110.050(b) identifies those uses and activities that are subject to the ACMP consistency review process:

> *(b) A project is subject to only one of the consistency review processes set out in this chapter if any activity that is part of the project*
>
> *(1) requires a*
>
> *(A) resource agency authorization;*
>
> *(B) federal consistency determination from a federal agency in accordance with 16 U.S.C. 1456(c)(1) and (2) (Coastal Zone Management Act) and 15 C.F.R. 930.36 - 930.40; or*
>
> *(C) federal consistency certification, in accordance with*
>
> *(i) 16 U.S.C. 1456(c)(3)(A) (Coastal Zone Management Act) and 15 C.F.R. 930.57 - 930.58; or*
>
> *(ii) 16 U.S.C. 1456(c)(3)(B) (Coastal Zone Management Act) and 15 C.F.R. 930.76, from a person who submits an OCS plan to the United States Secretary of the Interior; and*
>
> *(2) is located*
>
> *(A) within the coastal zone; or*
>
> *(B) in an area described in AS 46.40.096(l)(2) that is subject to a consistency determination under 15 C.F.R. Part 930.*

In addition, 11 AAC 110.015 addresses the application of the state's enforceable policies to a project requiring a federal consistency determination or a federal consistency certification:

> *For the purposes of a consistency review conducted under 16 U.S.C. 1456 for a project requiring a federal consistency determination or federal consistency certification, in accordance with the applicable provisions of 15 C.F.R. Part 930 and of the program, and notwithstanding a contrary provision of 11 AAC 112 or 11 AAC 114, a project within or affecting land or water uses or natural resources of the coastal zone is subject to the state standards in 11 AAC 112.200 - 11 AAC 112.990 and to applicable enforceable policies of a district coastal management plan approved under 11 AAC 114. Except as provided in 15 C.F.R. 930.54 and 11 AAC 110.400(c), federal license or permit activities that occur inland of the state's coastal zone boundary are not subject to a consistency review under this chapter.*

Subsection 6.1.1: Resource Agency Authorizations

"Resource agency" is defined at AS 46.39.010 as "(A) the Department of Environmental Conservation; (2) the Department of Fish and Game; or (3) the Department of Natural Resources." 11 AAC 110.750(a) describes those activities, as based on the resource agency authorizations, which are subject to the consistency review process:

> *The office, in consultation with the resource agencies, shall maintain a list of resource agency authorizations that authorize activities that may have a reasonably foreseeable direct or indirect effect on a coastal use or resource. The "C List" set out in Volume I of the List of Expedited Consistency Reviews and State Authorizations Subject to the ACMP, published by the office, as revised as of May 24, 2004, identifies the resource agency authorizations that authorize activities that may have a reasonably foreseeable direct or indirect effect on a coastal use or resource and is adopted by reference.*

Any proposed coastal project that requires an authorization listed on the "C List," and that is located within the state's coastal zone or defined geographic location description, is subject to the consistency process. In accordance with 11 AAC 110.010(c)(1), only the consistency review process set out in

> *11 AAC 110.200 – 11 AAC 110.270 apply, if the project requires only an authorization from one or more resource agencies.*

Subsection 6.1.2: Federal Consistency Determination from a Federal Agency

Any federal agency that proposes an activity within or affecting the state's coastal zone uses or resources is required to submit a federal consistency determination to OPMP. "Federal consistency determination" is defined at 11 AAC 110.990(a)(29) as

> *a submission that a federal agency provides to the office, in accordance with 16 U.S.C. 1456(c)(1) - (2) (Coastal Zone Management Act) and 15 C.F.R. 930.36 - 930.40, to indicate whether a federal agency activity will be undertaken in a manner consistent, to the maximum extent practicable, with the enforceable policies of the program.*

In accordance with 11 AAC 110.010(c)(2), only the consistency review process set out in

11 AAC 110.300 – 11 AAC 110.355 apply, if the project requires
(A) a federal consistency determination; or
(B) an authorization from one or more resource agencies and a federal consistency determination.

Subsection 6.1.3: Federal Consistency Certification

Any proposed coastal project that requires a federal consistency certification and that is located within the area identified under AS 46.40.096(*l*), is subject to the consistency review process.

"Federal consistency certification" is defined at 11 AAC 110.990(a)(28) as

a consistency certification that
(A) an applicant for a required federal license or permit provides to the office in accordance with 16 U.S.C. 1456(c)(3)(A) (Coastal Zone Management Act) and 15 C.F.R. 930.57 - 930.58; or
(B) is provided to the office, in accordance with 16 U.S.C. l456(c)(3)(B) (Coastal Zone Management Act) and 15 C.F.R. 930.76, by a person who submits an OCS plan to the United States Secretary of the Interior.

As defined at AS 46.40.096(*l*), a federal consistency certification is required for

(1) activities within the coastal zone; and
(2) activities on federal land, including the federal outer continental shelf, that would affect any land or water use or natural resource of the state's coastal zone; for purposes of this paragraph, those activities consist of any activity on the federal outer continental shelf and any activity on federal land that are within the geographic boundaries of the state's coastal zone notwithstanding the exclusion of federal land in 16 U.S.C. 1453(1).

In accordance with 11 AAC 110.010(c)(3), only the consistency review process set out in

11 AAC 110.400 – 11 AAC 110.455 apply, if the project requires
(A) a federal consistency certification; or
(B) an authorization from one or more resource agencies and a federal consistency certification.

Section 6.2: Coordinating Agency

OPMP will serve as the coordinating agency for the consistency review process and render the

(1) consistency determination for a project that requires an authorization from two or more (A) resource agencies; or (B) divisions or offices within the department.
(2) consistency response for a project that requires (A) a federal consistency determination; or (B) an authorization from one or more resource agencies and a federal consistency determination.
(3) consistency response for a project that requires (A) a federal consistency certification; or (B) an authorization from one or more resource agencies and a federal consistency certification.

For projects requiring authorizations from only a single DNR office, that office will coordinate the consistency review and determination process. For projects requiring authorizations from only a single state resource agency (e.g., DEC or DFG), that agency will coordinate the consistency review and determination process.

Section 6.3: Consistency Review Process for Project's Requiring Only One Or More State Agency Authorizations: 11 AAC 110.200 – 11 AAC 110.270

The regulations at 11 AAC 110.200 – 11 AAC 110.270 provide the requirements for the consistency review process for a project that only requires one or more resource agency authorizations. This section will describe the general process for a project subject to the consistency review under these regulations.

Subsection 6.3.1: Pre-review Assistance

In an effort to understand and/or share information in advance of a consistency review, a potential project applicant may request the coordinating agency provide pre-review assistance. 11 AAC 110.210. If such assistance is requested, the coordinating agency should arrange a meeting with the applicant, resource agencies, and potentially affected coastal resource district to discuss the potential project and share that relevant information identified in 11 AAC 110.210(b) and (c).

OPMP strongly encourages applicants to use this process if the potential project is complex and/or controversial. This pre-review assistance process is designed to share information such that projects, once the consistency review is initiated, can proceed with relatively few interruptions or "stop clocks."

Subsection 6.3.2: Determination of Consistency Review Packet Completeness

Once it is determined that the project is subject to the ACMP consistency review process, the applicant must submit a complete consistency review packet to the coordinating agency. 11 AAC 110.215. The applicant's packet must include:

> *(1) a completed coastal project questionnaire that includes*
>
> *(A) a complete and detailed description of the proposed project with sufficient specificity for the coordinating agency to determine the purpose of the proposed project and the potential impact to any coastal use or resource;*
>
> *(B) a consistency certification; the consistency certification must include a statement using the following language: "The proposed project complies with the applicable enforceable policies of the Alaska coastal management program and will be conducted in a manner consistent with the program";*
>
> *(C) data, information, and an evaluation of how the proposed project is consistent with the state standards and with any applicable district enforceable policies, sufficient to support the consistency certification required by (B) of this paragraph;*
>
> *(D) maps, diagrams, technical data, and other relevant material that precisely describe the project site location, topographical information, township, range, section, and meridian, and other site specific information; and*
>
> *(E) the signature of an authorized representative of the applicant and the date signed; and*
>
> *(2) copies of all resource agency authorization applications required for the project, except as provided in (e) of this section; each application must meet the authorizing resource agency's statutory and regulatory requirements for completeness.*

The coastal project questionnaire (CPQ) is the ACMP diagnostic tool used by the coordinating agency to determine the scope and description of the project subject to the consistency review.

The coordinating agency must evaluate the completeness of the applicant's packet, and determine whether it is sufficiently complete in accordance with 11 AAC 110.220. The coordinating agency must determine the packet's completeness within 21 days after receiving the complete packet.

Once the coordinating agency determines the consistency review packet is complete, the applicant is notified, the scope of the project subject to the consistency review is determined, and the start date for initiating the consistency review is identified.

Subsection 6.3.3: Determination of the Scope of the Project

Once it is determined that the applicant's consistency review packet is complete, the coordinating agency must determine the scope of the project subject to the consistency review process. AS 46.40.096(g) and (k), and 11 AAC 110.020, 11 AAC 110.225, and 11 AAC 110.700 establish the criteria and process for determining the scope of the project.

For a project that requires only state authorizations (one or more), the scope is defined at AS 46.40.096(g) and (k), 11 AAC 110.020(c), and 11 AAC 110.225 as, except for those noted exceptions identified below, those activities that are located within the areas defined in AS 46.40.096(*l*) that are subject to a state resource agency authorization, or are the subject of a coastal resource district enforceable policy. The scope of the consistency review is limited to these activities and components of the project, with the following exceptions:

- General and nationwide permits that have previously been determined to be consistent with the ACMP [AS 46.40.096(g)(1)(A)];
- The DEC statutory and regulatory determinations excluded from the consistency review by virtue of AS 46.40.040(b);
- Activities excluded under the Forest Resources and Practices Act (AS 41.17) [AS 46.40.096(g)(2)];
- An authorization or permit issued by the Alaska Oil and Gas Conservation Commission [AS 46.40.096(g)(3)]; and
- An activity that is subject to exclusion as a categorical or general consistency determination under 11 AAC 110.700(c).

In determining the scope of the project, the coordinating agency must:

1. Review the coastal project questionnaire;
2. Determine whether any of the activities of project qualify for exclusion from the consistency review as provided for in 11 AAC 110.020(c) and 11 AAC 110.700;
3. Determine which state permits or authorizations are required;
4. Consult with those authorizing resource agencies to identify the activities of the project the permit or authorization applies to;

5. Consult with any potentially affected coastal resource district to identify any activities of the project that are the subject of a district enforceable policy;
6. Establish the scope of the project subject to the consistency review process.

The scope of the review should explain what components of the project are included in the review, and what components of the project authorized by the above authorities are not included in the ACMP review under 11 AAC 110. As more fully described below, the scope of review for the DEC exclusion will explain that the DEC requirements are being reviewed separately by DEC. With respect to those portions of a project subject to DEC regulatory requirements, DEC will make its determination for that portion of the project under its regulatory procedures, and will coordinate with OPMP as part of the lead agency process. While the activities regulated by DEC are reviewed separately, the coordinating agency should review the activities of the project within the scope of the review for consistency with the other statewide standards in 11 AAC 112 and the applicable district enforceable policies, including those activities that are the subject of an affected district's enforceable policies.

The scope of the project subject to the consistency review should be determined as soon as possible, but no later than 21 days after receipt of the complete consistency review packet.

Subsection 6.3.4: Initiation of the Consistency Review

Within the 21 days after receiving the applicant's complete consistency review packet, the coordinating agency must initiate the consistency review for the proposed project. The length of the consistency review, either 30- or 50-days, is determined by reviewing the "C List" for all required state agency authorizations. If all of the state agency authorizations required for the project are listed in the "C List" as a 30-day consistency review, the coordinating agency shall initiate a 30-day consistency review for the project. However, if any of the state agency authorizations required for the project are listed in the "C List" as a 50-day consistency review, the coordinating agency must initiate a 50-day consistency review. 11 AAC 110.230.

The coordinating agency shall establish Day 1 of the consistency review on the day after the consistency review packet is determined to be complete, and shall provide public notice of the project's consistency review. The coordinating agency shall provide public notice of the project in accordance with 11 AAC 110.500.

After initiating the consistency review of the project, and by Day 3 of the consistency review, the coordinating agency shall

> *(1) provide to the applicant a notice that the consistency review has been initiated and a review schedule;*
> *(2) provide to each review participant a copy of the consistency review packet, the review schedule with a solicitation for review participants' comments, and a deadline for receipt of comment; and*
> *(3) either*
> *(A) provide a copy of the consistency review packet to a person requesting the information; or*
> *(B) make a copy of the consistency review packet available for public inspection and copying at a public place in an area that the project may affect, including within a district that the coordinating agency considers is likely to be an affected coastal resource district.* 11 AAC 110.235(d).

Subsection 6.3.5: Request for Additional Information

Although the state may have determined that the consistency review packet is complete in accordance with 11 AAC 110.220, there are often situations where additional information may be necessary in order for the review participants to determine whether the proposed project is consistent with the enforceable policies of the ACMP. The process and requirements for requesting additional information from the applicant and stopping the consistency review schedule are included at 11 AAC 110.240:

> *(a) No later than Day 13 in a 30-day consistency review or Day 25 in a 50-day consistency review, a review participant may provide the coordinating agency with any request for additional information necessary to determine whether the requestor concurs with or objects to the applicant's consistency certification.*
> *(b) The coordinating agency may, on or before Day 13 in a 30-day consistency review or Day 25 in a 50-day consistency review, request additional information at the agency's own initiative or based on a timely request received under (a) of this section. A request by the coordinating agency based on a request received under (a) of this section shall identify the requestor.*
> *(c) In requesting additional information from the applicant based on a request received under (a) of this section, the coordinating agency shall request information that is relevant to the proposed project and appropriate in the context of the requestor's expertise or area of responsibility. If a request for additional information submitted to the coordinating agency*

under (a) of this section is outside the requestor' s expertise or area of responsibility, the coordinating agency shall consult with all review participants with expertise or responsibility to determine whether the requested information is necessary to evaluate the project's consistency with the enforceable policies of the program.

(d) The applicant must provide the additional information requested by the coordinating agency to the coordinating agency and, if the information was requested by a review participant, to that requestor. The applicant shall provide sufficient copies of the requested information to the office for distribution to other interested review participants. The coordinating agency shall ensure that the requestor and other interested review participants receive the additional information.

(e) A review participant that requested information under (a) of this section shall notify the coordinating agency when the requested information is received. Within seven days after receiving the information, the requestor shall notify the coordinating agency whether the information is adequate or inadequate. If the requestor considers the information inadequate, the requestor shall also

(1) explain how the information submitted is inadequate; and

(2) identify the information that is needed to satisfy the original request or to address new issues raised in the applicant's response to the original request.

(f) After reviewing the additional information submitted by the applicant and the comments of any requestor under (e) of this section, the coordinating agency shall either inform the applicant that

(1) the additional information provided is adequate; or

(2) some or all of the information is inadequate and request the applicant to provide the further information that is still needed to satisfy the original request in the same manner as provided under (d) of this section for the applicant's original response.

(g) Nothing in this section prohibits a resource agency from requiring additional information under the statutory and regulatory authorities applicable to the review of the resource agency's authorization.

Subsection 6.3.6: Comments and Comment Deadlines

For consistency reviews established as 30-day consistency reviews, comments regarding the consistency of the project are due to the coordinating agency by Day 17. For 50-day consistency reviews, the comment deadline is Day 30. 11 AAC 110.245.

The coordinating agency solicits comments on the consistency of the proposed project with the enforceable policies of the ACMP. Though there are no restrictions or limitations on what a commentor can address within the comments they submit on a project, there are requirements that a commentor must meet.

Review participants, as defined in 11 AAC 110.990(a)(41), include the resource agencies, a state agency that has requested participation in a consistency review, and an affected coastal resource district. In accordance with 11 AAC 110.250(a), comments submitted by a review participant must

> *be in writing and must*
>
> *(1) state that, and explain why, the review participant concurs with the applicant's consistency certification; or*
>
> *(2) identify that the review participant objects to the applicant's consistency certification and identify*
>
> *(A) the specific enforceable policies with which the proposed project is inconsistent and explain why the review participant considers the proposed project inconsistent with those enforceable policies; and*
>
> *(B) any alternative measure that, if adopted by the applicant, would achieve consistency with the specific enforceable policies identified under (A) of this paragraph and explain how the alternative measure would achieve consistency with those specific enforceable policies.*

In accordance with 11 AAC 110.510:

> *(a) A person may comment on the consistency of a project by submitting written comments addressed directly to the coordinating agency on or before the comment deadline established under 11 AAC 110.245, 11 AAC 110.325, or 11 AAC 110.430, as applicable, or by presenting oral or written comment to the coordinating agency at a public hearing that the coordinating agency schedules and holds under 11 AAC 110.520.*
>
> *(b) If a person contends that a project is inconsistent with an enforceable policy of the program, the oral or written comment must identify the enforceable policy and explain how the project is inconsistent with the policy.*

For those comments that the coordinating agency received by the established comment deadline, the coordinating agency will send or otherwise make the comments available to the applicant, each resource agency, and any potentially affected coastal resource district. Upon request, the coordinating agency will also make a copy of the comments available to other interested persons.

Subsection 6.3.7: Proposed Consistency Determination

Following the close of the review and comment period, the coordinating agency must review and consider those comments that were timely received. The coordinating agency must evaluate the information included within the project packet, in addition to those timely submitted comments, resolve any conflicts presented in the comments, and prepare a proposed consistency determination. The development of the proposed consistency determination is provided for at 11 AAC 110.255:

> *(a) In developing a proposed consistency determination, the coordinating agency shall give careful consideration to all comments. The coordinating agency shall give a commenting resource agency and coastal resource district with an approved plan due deference within that agency's or district's expertise or area of responsibility. In developing a proposed consistency determination and any applicable alternative measures, the coordinating agency must evaluate the applicability of the enforceable policies of the program to the proposed activity and decide how to afford due deference.*
>
> *(b) Based on the comments received and other available information, the coordinating agency shall determine whether a consensus exists among the review participants regarding*
>
> *(1) a project's consistency with the enforceable policies of the program; and*
>
> *(2) any alternative measures that would achieve consistency with the enforceable policies of the program.*
>
> *(c) If the comments indicate that a consensus does not exist among the review participants, the coordinating agency shall facilitate a discussion among the review participants to attempt to reach a consensus. If the review participants cannot reach consensus, the coordinating agency shall develop a proposed consistency determination that is based on the comments and positions of the resource agencies and affected coastal resource districts.*
>
> *(d) If the coordinating agency substantially modifies or rejects an alternative measure requested by a commenting review participant within that participant's respective expertise or area of responsibility, the coordinating agency shall consult with the review participant and provide a brief written explanation stating the reasons for rejecting or modifying the alternative measure before issuing the proposed consistency determination.*
>
> *(e) On or before Day 24 in a 30-day consistency review or Day 44 in a 50-day consistency review, the coordinating agency shall distribute a proposed consistency determination to the review participants, the applicant,*

and any person who submitted timely program comments under 11 AAC 110.510(a) and, if applicable, 11 AAC 110.510(b).

(f) The proposed consistency determination must

(1) contain a description of the proposed project;

(2) contain a description of the scope of the project subject to consistency review;

(3) propose to concur with or object to the applicant's consistency certification;

(4) contain a statement identifying the availability of an elevation under 11 AAC 110.600 and the deadline for submitting a request for elevation under that section; and

(5) be issued by electronic mail or facsimile to the applicant and each review participant that may request elevation under 11 AAC 110.600(a).

(g) In addition to the requirements in (f) of this section, if a concurrence with the applicant's consistency certification is proposed, the proposed consistency determination must include an explanation of how the proposed project is consistent with the applicable enforceable policies of the program.

(h) In addition to the requirements in (f) of this section, if an objection to the applicant's consistency certification is proposed, the coordinating agency shall notify the applicant of the objection and shall include in the proposed consistency determination

(1) an identification of the specific enforceable policies and the reasons why the proposed project is to be found inconsistent with those enforceable policies; and

(2) any alternative measure that, if adopted by the applicant, would achieve consistency with the specific enforceable policies identified under (1) of this subsection and an explanation of how the alternative measure would achieve consistency with those specific enforceable policies; the alternative measure must be described with sufficient specificity to allow the applicant to determine whether to

(A) adopt the alternative measure;

(B) otherwise modify the project to achieve consistency with the enforceable policies of the program; or

(C) abandon the project.

(i) If the applicant modifies the project under (h)(2)(B) of this section, or if the coordinating agency is able to informally resolve an issue that has resulted or could result in the submission of a request for elevation under 11 AAC 110.600, the coordinating agency, with the applicant's concurrence, may issue a revised proposed consistency determination.

(j) The coordinating agency may immediately issue a final consistency determination under 11 AAC 110.260 if the review participants

concur with the proposed consistency determination and the applicant adopts the alternative measures, if any, identified under (h)(2) of this section.

Subsection 6.3.8: Final Consistency Determination

Following issuance of the proposed consistency determination, and if there are no requests for elevations (see Section 6.7 of this chapter), the coordinating agency must prepare the final consistency determination. That process is included at 11 AAC 110.260:

(a) A final consistency determination rendered under AS 46.39.010(a) or AS 46.40.096(d) must

(1) contain a description of the proposed project;

(2) contain a description of the scope of the project subject to consistency review;

(3) concur with or object to the applicant's consistency certification; and

(4) contain a statement that the final consistency determination is a final administrative order and decision under the program.

(b) In addition to meeting the requirements in (a) of this section, a final consistency determination that

(1) concurs with the applicant's consistency certification must include an explanation of how the proposed project is consistent with the applicable enforceable policies of the program; or

(2) objects to the applicant's consistency certification must include an identification of the specific enforceable policies and the reasons why the coordinating agency has found the proposed project inconsistent with those enforceable policies.

(c) In addition to meeting the requirements in (a) and (b) of this section, the final consistency determination must include any change made by the coordinating agency between issuance of the proposed consistency determination and issuance of the final consistency determination, including

(1) the incorporation, within the project description, of any

(A) alternative measures that are

(i) proposed in the proposed consistency determination under 11 AAC 110.255(h)(2); and

(ii) adopted by the applicant; and

(B) modification by the applicant of the project to achieve consistency with the enforceable policies of the program; and

(2) any minor editorial or technical corrections.

(d) The coordinating agency shall provide the final consistency determination to

(1) the applicant;
(2) each resource agency;
(3) each commenting review participant;
(4) each agency that commented on the project; and
(5) each person who submitted timely program comments under 11 AAC 110.510(a) and, if applicable, 11 AAC 110.510(b).

AS 46.40.096(n) and (o) establish a 90-day deadline for completing a consistency review. AS 46.40.096(p) expressly states that a consistency review under AS 46.40.096 may not be held up by a DEC or other permit excluded under AS 46.40.096(g).

The statutory requirements were implemented in 11 AAC 110.265. There, amendments were made to clarify that the coordinating agency must render the final consistency determination within 90 days after receipt of a complete application, with the following exceptions. The 90-day time limitation does not apply to a consistency review involving the disposal of an interest in state land or resources, and is suspended from the time the coordinating agency determines that the applicant has not adequately responded in writing within 14 days after receipt of a written request from the coordinating agency for additional information under 11 AAC 110.240, until the time the coordinating agency determines that the applicant has provided an adequate written response. The time limitation is also suspended during a period of time requested by the applicant and during the period of time a consistency review is undergoing an elevation under 11 AAC 110.600.

Subsection 6.3.9: Timing, Schedule Modifications, and Terminations

11 AAC 110.910 provides the means for computing the times and milestones of the consistency review process:

A time period under this chapter must be calculated using calendar days. An action required to be taken on a specific day must be taken no later than 5:00 p.m. that day, except that an action required to be taken on a Saturday, Sunday, or state or federal holiday must be taken no later than 5:00 p.m. the next working day.

However, it is important to recognize that the times and milestones of the consistency review process may be stayed for certain reasons. Those reasons are identified in 11 AAC 110.270:

(a) Subject to the overall time limit established under 11 AAC 110.265(a) and, if applicable, 11 AAC 110.265(b)(2), the coordinating agency may modify the consistency review schedule under the following circumstances and for the time specified:

(1) the coordinating agency and a resource agency may agree to modify the review schedule as necessary to coordinate the consistency review with the resource agency's statutory or regulatory authorization review process, including a disposal of an interest in state land, so long as the length of time for receipt of comments is at least as long as under 11 AAC 110.245;

(2) if the coordinating agency receives a request for additional information from a review participant under 11 AAC 110.240(a), the coordinating agency may modify the review schedule by up to three days to evaluate the request and consult with other review participants with expertise or responsibility;

(3) consistent with 11 AAC 110.265(b)(2)(A), if the coordinating agency requests additional information from the applicant under 11 AAC 110.240, the coordinating agency may modify the review schedule as necessary until the requesting review participant receives the information and considers the information adequate within the timeframe identified under 11 AAC 110.240(e);

(4) the coordinating agency may modify the review schedule as necessary for a public hearing or public meeting that is held as part of

(A) a consistency review;

(B) a resource agency's review of a necessary authorization application; or

(C) preparation of an affected coastal resource district's comments for submission to the coordinating agency;

(5) the coordinating agency may modify the review schedule as necessary for the adjudication process of an authorization issued by a coastal resource district exercising authority under AS 29, if the coastal resource district's consistency review comments under 11 AAC 110.250 are pending the results of the adjudication;

(6) the coordinating agency may extend the review schedule at the request of the applicant;

(7) the coordinating agency may modify the review schedule to address a question of law;

(8) the coordinating agency may modify the review schedule by up to five days for a resource agency or coastal resource district to consider timely submitted public comments;

(9) the coordinating agency may extend the comment deadline by up to 10 days for a project within a coastal resource service area;

(10) the coordinating agency may extend the review schedule by up to 10 days if a review participant requests time for a field review;

(11) if the coordinating agency issues a revised proposed consistency determination or consistency response under 11 AAC 110.255(i) or 11 AAC 110.440(e), the coordinating agency may modify the review schedule by up to five days to allow for the submission of a request for elevation under 11 AAC 110.600;

(12) if the coordinating agency receives a request for elevation under 11 AAC 110.600, the coordinating agency shall suspend the review schedule by no more than 45 days, or until the commissioner's decision on the elevation is made, whichever occurs first.

(b) The coordinating agency shall notify the applicant and each review participant of a schedule modification and the reasons for the schedule modification.

(c) Except for a review modified under (a)(3) of this section, when the coordinating agency restarts a review for which the schedule was modified under this section, the day that the review is restarted shall be assigned the day of the review schedule on which the review was stopped. For a review modified under (a)(3) of this section, the day that the review is restarted shall be assigned the day of the review schedule following the day on which the review was stopped.

(d) A resource agency may deny an authorization any time before, during, or after the consistency review has been completed. If an authorization is denied during a consistency review, the coordinating agency and review participants may agree to suspend or terminate the consistency review.

The consistency review process is designed to be completed in 30 or 50 days, as described in above sections. However, for good reasons, as evidenced in the above citation, the coordinating agency may need to stay the clock or extend the consistency review process. Additionally, except as noted in the Subsection 6.3.8, the consistency review must be completed within 90 days.

The regulations at 11 AAC 110.800 – 830 provide the process and requirements for addressing project modifications that occur during and after a consistency review, the termination of a consistency review, and the consistency review process for state agency authorizations, re-issuances, and expirations. In all cases, the regulations provide the process for those projects that only require resource agency authorizations. Those uses or activities that are subject to the federal consistency provisions of 15 C.F.R. 930 are to be processed in accordance with those regulations.

Section 6.4: Federal Consistency Determination from a Federal Agency

As a reminder, OPMP is the coordinating agency for the review of a federal consistency determination submitted by a federal agency. The consistency review process for a federal consistency determination is set out at 11 AAC 110.300 – 11 AAC 110.355. It is important to note that the regulations at 11 AAC 110.300 – 11 AAC 110.355 were promulgated to supplement the federal consistency regulations at 15 C.F.R. 930.30 – 930.46. To the extent there is any conflicting provision within the state regulations, the federal regulations are controlling.

The general process for conducting a consistency review of a federal consistency determination remains the same as that described in Section 6.3 of this chapter. However, there are some very important distinctions and nuances that are discussed in the following subsections.

Subsection 6.4.1: Determination of Scope of the Federal Consistency Determination

The scope of the federal agency activity that is subject to the consistency review process of 11 AAC 110.300 – 11 AAC 110.355 is determined by the requirements of 15 C.F.R. 930.30 – 930.46. The content of the federal consistency determination, described below, establishes the scope of the federal consistency determination subject to the consistency review.

Subsection 6.4.2: Determination of Completeness of a Federal Consistency Determination

11 AAC 110.310 requires that OPMP determine completeness of the federal consistency determination in accordance with the requirements of 15 C.F.R. 930.39(a), which reads, in part:

> *The consistency determination shall include a brief statement indicating whether the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the management program. The statement must be based upon an evaluation of the relevant enforceable policies of the management program. A description of this evaluation shall be included in the consistency determination, or provided to the State agency simultaneously with the consistency determination if the evaluation is contained in another document.*
> *…*
> *The consistency determination shall also include a detailed description of the activity, its associated facilities, and their coastal effects, and*

comprehensive data and information sufficient to support the Federal agency's consistency statement. The amount of detail in the evaluation of the enforceable policies, activity description and supporting information shall be commensurate with the expected coastal effects of the activity. The federal agency may submit the necessary information in any manner it chooses so long as the requirements of this subpart are satisfied.

Subsection 6.4.3: Comment Deadline for a Federal Consistency Determination

As provided at 11 AAC 110.325(a), OPMP "shall establish a 30-day comment deadline for receipt of public and review participant comment regarding a federal consistency determination."

Subsection 6.4.4: Proposed Consistency Response to a Federal Consistency Determination

15 C.F.R. 930 establishes the naming convention for certain documents and procedures. The formal term applied to OPMP's proposed consistency determination, as provided at 11 AAC 110.255 and described in Subsection 6.3.6, for a federal consistency determination is the "proposed consistency response." 11 AAC 110.335 provides the process for OPMP to develop and issue the proposed consistency response for the federal consistency determination.

Subsection 6.4.5: Final Consistency Response to a Federal Consistency Determination

It is important to recognize and understand that, in accordance with 15 C.F.R. 930.30 – 930.46, Federal agency activities will be undertaken in a manner consistent to the *maximum extent practicable* with the enforceable policies of the approved management program. "Maximum extent practicable" is defined at 15 C.F.R. 930.32 to mean "fully consistent with the enforceable policies of the management programs unless full consistency is prohibited by existing law applicable to the Federal agency."

11 AAC 110.345 sets forth the process and requirements for OPMP to issue the final consistency response to a federal consistency determination. Though the procedures of this section are similar to that of 11 AAC 110.260, one important distinction is that, under 11 AAC 110.345(b)(2), if OPMP objects to the federal consistency determination, OPMP "must set out that objection in the form and manner required by 15 C.F.R. 930.43 and must include a statement informing the federal agency of the availability of mediation through the United State Secretary of Commerce under 15 C.F.R. 930.112 – 930.116.

Subsection 6.4.6: Federal Negative Determination

11 AAC 110.355 establishes the process for reviewing a federal negative determination.

Subsection 6.4.7: Timing of Review

While the structure of the consistency review process for a federal consistency determination, as laid out in 11 AAC 110.300 – 11 AAC 110.355, is based upon the same 50-day review schedule as described in Section 6.3 of this chapter, it is critical to understand that the federal regulations at 15 C.F.R. 930 are controlling, and in fact require that the consistency response be issued within 60-days from receipt of a complete federal consistency determination and supporting information. However, as required at 930.41(b), "Federal agencies shall approve one request for an extension period of 15 days or less. In considering whether a longer or additional extension period is appropriate, the Federal agency should consider the magnitude and complexity of the information contained in the consistency determination."

11 AAC 110.325(b) then addresses the review schedule modifications that may be permissible:

> *The review schedule may be modified for the reasons provided under 11 AAC 110.270(a), so long as the final consistency response is provided under 11 AAC 110.345 to the federal agency on or before the deadline set under 15 C.F.R. 930.41, including any extensions granted by the federal agency.*

Section 6.5: Federal Consistency Certification

As a reminder, OPMP is the coordinating agency for the review of a federal consistency certification. The consistency review process for a federal consistency certification is set out at 11 AAC 110.400 – 11 AAC 110.455. It is important to note that the regulations at 11 AAC 110.400 – 11 AAC 110.455 were promulgated to supplement the federal consistency regulations at 15 C.F.R. 930.50 – 930.66. To the extent there is any conflicting provision within the state regulations, the federal regulations are controlling.

The general process for conducting a consistency review of a federal consistency certification remains the same as that described in Section 6.3 of this chapter. However, there are some very important distinctions and nuances that are discussed in the following subsections.

Subsection 6.5.1: Determination of Scope of the Federal Consistency Certification

The scope of the project that is subject to the consistency review process of 11 AAC 110.400 – 11 AAC 110.455 is determined by the requirements of 15 C.F.R. 930.50 – 930.66 and the exclusion of activities under 11 AAC 110.700. The content of the federal consistency certification, described below, establishes the scope of the federal consistency certification subject to the consistency review.

Subsection 6.5.2: Timing of Review

While the structure of the consistency review process for a federal consistency certification, as laid out in 11 AAC 110.400 – 11 AAC 110.455, is based upon the same 50-day review schedule as described in Section 6.3, it is critical to understand that the federal regulations at 15 C.F.R. 930 are controlling, and in fact establish a separate, but parallel time frame for issuance of the final consistency determination. As provided at 15 C.F.R. 930.62 and 930.63, OPMP is required to issue the final consistency determination within six months after receiving a complete federal consistency certification, otherwise the Federal agency and the applicant can assume concurrence on the certification.

However, 11 AAC 110.430(b)-(d) provides OPMP with the authority to modify both the 50-day review schedule as well as the six month deadline:

> *(b) The office may modify the review schedule for the reasons provided under 11 AAC 110.270(a), so long as the final consistency response is provided under 11 AAC 110.445 to the federal agency on or before the deadline set under 16 U.S.C. l456(c)(3)(A) (Coastal Zone Management Act).*
>
> *(c) If the office has not issued a proposed consistency response within three months after receipt of a complete consistency certification, the office shall notify the applicant and federal agency of the status of the consistency review and the reason for further delay.*
>
> *(d) The office and an applicant may mutually agree, in accordance with 15 C.F.R. 930.60(a)(3), to stay the consistency review or extend the six-month federal review period.*
>
> *(e) Notwithstanding (a) - (d) of this section, the office must issue the final determination within the deadline established under 11 AAC 110.265.*

Subsection 6.5.3: Review Process for Exploration, Development, and Production Activities on the Outer Continental Shelf

11 AAC 110.455 addresses the ACMP review process for a federal license or permit activity described in detail within an OCS plan:

> *(a) A consistency review for a federal license or permit activity described in detail within an OCS plan shall be conducted in accordance with the requirements of 15 C.F.R. 930.70 - 930.85 and 11 AAC 110.405 – 11 AAC 110.450.*
>
> *(b) For purposes of this section, "federal license or permit activity described in detail" has the meaning given in 15 C.F.R. 930.71.*

Section 6.6: DEC Carveout

The issuance of DEC permits, certifications, approvals, and authorizations establishes consistency with the ACMP program for those activities of a proposed project[6] subject to those permits, certifications, approvals or authorizations. AS 46.04.040(b)(1). This concept is a statutory restatement of the 11 AAC 112.310 air, land and water quality standard. This self-implementing concept is provided for in 11 AAC 110.010(b). Consequently, with the exception of AS 46.40.040(b)(2) -- where there is no DEC authorization "because the activity is a federal activity or the activity in located on federal land" -- the consistency review process in 11 AAC 110 does not include air, land or water quality determinations.

While air, land, and water quality standard determinations made by DEC are not subject to consistency review, the requirement of a DEC authorization may trigger consistency reviews of other activities of a larger project. As provided by AS 46.40.096(j), a project that includes an activity subject to a DEC authorization on the "C List" may be subject to review under 11 AAC 110 if the project includes a different activity that is not subject to a DEC authorization but is the subject of an enforceable district policy. The specific activities subject to the DEC authorization are not within the scope of those project activities to be reviewed. See 11 AAC 110.020(c) defining the scope of the project subject to consistency review. In the case of a DEC single agency review, the scope of review is limited to an activity that is "the subject of a district enforceable policy." 11 AAC 110.020(C)(2); 11 AAC 110.040(c).

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[6] A "project" means all activities that will be part of a proposed development [AS 46.40.210(14)]. Activities excluded from a consistency review include those authorized by the DEC, Alaska Oil and Gas Conservation Commission, the Alaska Forest Practices Act (AS 41.17) and general or nationwide permits (AS 46.40.096(g)). The scope of a DEC single agency project consistency review is further limited to only those activities in Alaska's coastal zone that are the subject of a coastal resource district enforceable policy (AS 46.40.096(k).

As a matter of DEC policy, DEC may choose to waive a 401 Certification for a Corps of Engineers' (COE) permit, if DEC determines that the activity is *de minimis* in nature and not subject to further consistency review under 11 AAC 112.310. However, state agencies and members of the public may choose to comment to OPMP or DEC on any effects the project may have on water quality. OPMP may then consult with DEC to determine whether the comments have merit.

For further analysis of the 11 AAC 110 DEC carveout, a sectional analysis follows:

- AS 46.40.096(g) states that activities previously authorized under a general or nationwide permit, or subject to a DEC authorization described in AS 46.40.040 shall be excluded from the consistency review and determination process. This new section removes the duplication of DEC's permitting review process in a consistency review. The specific activities regulated by DEC are not to be included in the consistency review process, and are not considered part of the scope of the project subject to review under AS 46.40.096(k).
- AS 46.40.040(b)(1) establishes that AS 46.03, AS 46.04, AS 46.09, and AS 46.14, and the implementing regulations, constitute the exclusive enforceable policies for those purposes.
- AS 46.40.040(b)(2) addresses activities that do not require a DEC authorization because the activity is a federal activity, or is located on federal lands or a part of the outer continental shelf (OCS). In these cases, under 11 AAC 112.310, the activities must still be found consistent with DEC's standards, even though the activity does not require a DEC authorization. So in order to achieve the federally mandated coordinated consistency review DEC, nonetheless, applies its regulatory standards to the proposed activity and forwards its findings to OPMP to include in the state consistency determination. This section conforms with the existing Air, Land, and Water Quality standard at 11 AAC 112.310 and the CZMA's requirement that the state's air and water quality standards be included in the state's coastal program.
- 11 AAC 110.010. Applicability of the Alaska coastal management program consistency review process. This section makes a clear distinction between AS 46.40.040(a) DEC authorizations which are implemented through DEC's procedures and the consistency review process under AS 46.40.096.
- 11 AAC 110.010(a) explains that chapter 110 sets out the consistency review process called for in AS 46.40.096.
- 11 AAC 110.010(b) provides that activities that are subject to authorization by DEC under AS 46.04.040(b)(1) are excluded from the consistency review process. In the case of a DEC-only authorization project, only activities

outside the activities addressed by the DEC authorization and are the subject of a district enforceable policy are subject to a consistency review under AS 46.40.096. See 11 AAC 110.040.

- 11 AAC 110.010(b)(1) explains that DEC authorizations are self-implementing since they are matters of direct state authorization under 16 U.S.C. 1455(d)(11)(B) and are not coordinated under chapter 110. See also 11 AAC 110.040b).
- 11 AAC 110.010(b)(2) requires that DEC provide its findings under AS 46.40.040(b)(2) when there is no DEC authorization "because the activity is a federal activity or the activity in located on federal land" by the review deadlines in article 3 for federal activities, and article 4 for federal authorizations.
- 11 AAC 110.030(e) provides that OPMP will coordinate with DEC and issue its findings under AS 46.04.040(b)(2) where there is no DEC authorization because the activity is a federal activity or the activity is located on federal land.
- 11 AAC 110.040. This section provides the procedure for DEC limited consistency reviews. Subsection (a) explains that this section addresses projects that are subject only to a DEC authorization on the “C List”.
- 11 AAC 110.040(b) provides that those specific aspects of a project subject only to a DEC authorization on the “C List” are excluded from the scope of a consistency review under this chapter.
- 11 AAC 110.040(c) explains the review of activities outside of those authorized by the DEC permit which are the subject of district enforceable policy. Subsection (c) references just the district policy scope section of .020(c)(2).
- 11 AAC 110.040(d) provides that DEC or OPMP, if agreed to by DEC and OPMP, will conduct the limited consistency review described in (c) using the article 2 procedures after determining scope in consultation with the district.

It is also instructive to review the actual procedure by which DEC will participate and coordinate in ACMP consistency reviews. DEC Policy Guidance No. 2003-001, January 7, 2004 is entitled “DEC Single Agency Coastal Management Consistency Review Procedures,” and sets forth “Uniform Procedures for Conducting a Coastal Management Consistency Review For Projects that Only Require a [DEC] Permit or Contingency Plan Approval to Operate.” The Guidance provides that, upon receipt of an application for an activity within the coastal zone boundaries of an approved coastal district that only requires an applicable department authorization listed above, the following procedures will apply:

1. If a project is located within the coastal zone boundaries of an approved coastal district the application for an applicable department permit must include a completed Alaska Coastal Management Program, Coastal Project Questionnaire (CPQ).
2. Upon receipt of a department permit application and completed CPQ, the department permit reviewer will use the information provided by the applicant in the CPQ to determine if the project only requires an authorization from the department or if authorizations are required from other state or federal agency(s).
3. If it is determined that the applicant requires authorizations from other state or federal agencies, the department permit reviewer should send the completed CPQ to the Department of Natural Resources, Office of Project Management and Permitting (OPMP) to coordinate the project consistency review. A letter transferring the project consistency review should be sent to OPMP with a copy to the applicant.
4. If it is determined that the applicant only needs an authorization from the department, a consistency review of the applicant's project may be required. A letter via fax or email should be sent to the applicant and the affected coastal district(s)[7] with a copy to OPMP that explains the department's responsibility to determine if the scope of the applicant's project includes activities that are the subject of a coastal district enforceable policy.[8]
5. The affected coastal district(s) has ten calendar days from issuance of the project scope letter sent via fax or email to notify the assigned department permit reviewer whether the applicant's project includes activities subject to a coastal district enforceable policy.
6. If the coastal district coordinator of an affected coastal district fails to contact the department by the ten day comment deadline, or comments that the applicant's project does not include activities that are the subject of an enforceable policy a department coordinated consistency review is not required. A letter should be sent to the applicant, affected coastal district(s) and OPMP explaining that a coastal consistency review is not required for the applicant's project.
7. If the coastal district coordinator of an affected coastal district contacts the department by the ten-day comment deadline with

[7] This requirement derives from the regulatory requirement that, in determining scope, DEC, as any coordinating agency, shall consult with any potentially affected coastal resource district. 11 AAC 110.020(d).

[8] DEC must identify any non-DEC permitted activity of the project that is the subject of an enforceable policy of the district, and shall establish the scope of the consistency review for any such non-permitted activities identified [AS 46.40.096(k)].

comments that the applicant's project does include activities that are the subject of an enforceable policy a department coordinated consistency review may be required. A copy of the department permit application, CPQ and any correspondence with the applicant, coastal district and OPMP should be immediately sent to DEC's Deputy Commissioner.

8. Within four calendar days from the receipt of project information and coastal district comments, the DEC Deputy Commissioner will determine the scope of the project and whether it includes activities subject to a coastal consistency review.[9]
9. If the Deputy Commissioner determines the scope of the project includes activities subject to enforceable district policies that require the department to coordinate a coastal consistency review, the Deputy Commissioner will notify the department's permit reviewer. The department permit review reviewer will determine the most appropriate schedule to follow for managing both the department's coordination of the coastal consistency review process as provided under 11 AAC 110 and department specific authorization(s). The department permit reviewer will notify the applicant, coastal district, and OPMP of the ACMP scope of review.
10. If the deputy commissioner determines the scope of the project does not include enforceable district policies that require the department to coordinate a coastal consistency review, the Deputy Commissioner will notify the departments permit reviewer, applicant, coastal district, and OPMP of the determination.

AS 46.40.096(p) states that a consistency review and determination for those activities not subject to a DEC authorization "… may not be delayed or withheld pending issuance of the permits, certifications, approvals, and authorizations …" from DEC, "… but shall proceed regardless of the status of those permits, certifications, approvals, and authorizations." This means that an applicant may need two "determinations" to be consistent with the ACMP: (1) the coordinating agency's final consistency determination under AS 46.40.096; and (2) DEC's permit authorizations as a finding of compliance under AS 46.40.040(b). However, the coordinating agency's issuance of the final consistency determination may not be held up waiting for the DEC permit authorization issuance. Though the federal consistency review "determinations" may proceed on separate paths and

[9] Again, the specific activities that DEC regulates and authorizes are excluded from the consistency review under AS 46.40.096(g). For the consistency review of those non-permitted activities of the project, DEC coordinates the review, determining whether the project complies with the enforceable policies of the ACMP. If DEC, in consultation with any affected coastal resource district, does not identify any other activities of the project as being the subject of the district's enforceable policies, no consistency review under AS 46.40.096 for the project is required, since DEC's review is a consistency review for its purposes.

time frames, the issuance (or denial) of the DEC authorization must still be achieved within the timeframes established in 15 C.F.R. 930.

If the federal consistency review requires a DEC authorization, OPMP will issue a cover letter for DEC indicating DEC objection or concurrence when DEC completes its permit review and finding of compliance with the DEC statutes listed in AS 46.40.040(b).

Section 6.7: Coastal Resource District Participation

AS 46.40.100(a) requires municipalities and state resource agencies to "administer land and water use regulations or controls in conformity with district coastal management plans approved under this chapter and in effect." As incentive for coastal resource district participation, districts are provided ACMP funds to assist the development of coastal development plans, and specifically funded to participate in consistency reviews of proposed projects that may affect the coastal uses or resources within their coastal district boundary.

11 AAC 110.060 establishes the coastal district responsibility as it relates to the consistency review process:

> *(a) A coastal resource district may participate in a consistency review as an affected coastal resource district if the*
>
> *(1) project is proposed to be located within the coastal resource district boundaries; or*
>
> *(2) district demonstrates that a project located outside the coastal resource district boundaries may have a direct and significant impact on a coastal use or resource within the coastal zone and within the coastal resource district boundaries.*
>
> *(b) A coastal resource district that elects to participate in a consistency review under this chapter must participate by submitting comments to the coordinating agency regarding consistency of the proposed project with the enforceable policies of the program.*
>
> *(c) A coastal resource district whose district coastal management plan has taken effect under 11 AAC 114.360 or remains in effect under sec. 46(c), ch. 24, SLA 2003, as amended by sec. 16, ch.31, SLA 2005, is considered to have expertise in the interpretation of that plan.*

It is important for a district that has an approved coastal management plan to participate in the consistency review of a project. A district that participates within the consistency review process is considered to have expertise in the interpretation

of that plan, as described above, and may be afforded due deference by the coordination agency (see discussion below).

Section 6.8: Due Deference

Due deference is a concept and practice within the consistency review process that affords the commenting review participants the opportunity to include, review or refine the alternative measures or consistency concurrence if they have the expertise in the resource or the responsibility for managing the resource. Due deference is defined at 11 AAC 110.990(a)(25):

> *... that deference that is appropriate in the context of*
> *(A) the commentor's expertise or area of responsibility; and*
> *(B) all the evidence available to support any factual assertions of the commentor.*

The process the coordinating agency is to use in developing the proposed consistency determination and affording due deference is found at 11 AAC 110.255(a):

> *In developing a proposed consistency determination, the coordinating agency shall give careful consideration to all comments. The coordinating agency shall give a commenting resource agency and coastal resource district with an approved plan due deference within that agency's or district's expertise or area of responsibility. In developing a proposed consistency determination and any applicable alternative measures, the coordinating agency must evaluate the applicability of the enforceable policies of the program to the proposed activity and decide how to afford due deference.*

As an example, in the development of the proposed consistency determination for a project, the coordinating agency must evaluate the applicability of the habitat standard to the proposed activity, and decide which commenting agency or district has expertise or responsibility for the area. Typically, due deference for the riparian management area issues would be afforded to DNR/Office of Habitat Management and Permitting or DFG/Sport Fish Division, who have expertise and responsibility for those areas. In addition, the coordinating agency may afford due deference to another commenting agency or district that does have the appropriate level of expertise.

As another example, a district may submit comments on the consistency of a proposed project with the district's enforceable policies. That district has expertise

in the interpretation of its plan, and should therefore be afforded deference by the coordinating agency. However, the district need not have a specific policy that applies, but it must have an approved district plan and must have commented during the consistency review. For example, a district may submit comments on the consistency of a proposed project with the state standards at 11 AAC 112. The coordinating agency must then consider how to afford due deference, and must consider all the evidence available to support any factual assertions of the district and other commenting review participants commentors. If the district can demonstrate expertise in the field, the coordinating agency will afford that district due deference. Examples of where a district would be deemed to have expertise in the field is where the district has documented "local knowledge" of a given subject in its resource inventory under 11 AAC 114.230(d) or its resource analysis under 11 AAC 114.240(b), or where the district has compiled a regional study on an issue such as circulation patterns of wind, water or ice, or species migration routes or patterns.

Section 6.9: Public Notice

As required at 11 AAC 110.500(a), "public notice must be provided for the consistency review of a project." The requirements for issuing a public notice for the consistency review of a project are included at 11 AAC 110.500(b)-(d):

> *(b) To provide sufficient public notice of a consistency review, a notice must*
>
> *(1) comply with the requirements of AS 46.40.096(c);*
>
> *(2) solicit comments to be addressed and submitted to the coordinating agency regarding the project's consistency with the enforceable policies of the program;*
>
> *(3) specify the deadline for receipt of comments by the coordinating agency;*
>
> *(4) identify, to the extent known at the time the notice is issued, each public place at which copies of the consistency review packet and review schedule will be available for public inspection and copying, if the coordinating agency makes the review packet and schedule available under 11 AAC 110.235(d)(3)(B), 11 AAC 110.315(b)(2)(C)(ii), or 11 AAC 110.420(2)(C)(ii);*
>
> *(5) be issued by at least one of the following methods:*
>
> *(A) publication in a newspaper of general circulation within each district that the coordinating agency considers to be an affected coastal resource district or within an area outside a coastal resource district that the agency considers the project will likely affect; or*

(B) posting

(i) on an Internet web site maintained by the state and dedicated to consistency review public notices; and

(ii) in at least three public places within each district that the coordinating agency considers to be an affected coastal resource district or within an area outside a coastal resource district that the agency considers the project will likely affect; however, notwithstanding the requirement of this sub-subparagraph, public notice may be posted in no less than one public place if the coordinating agency determines that the area likely to be affected has a population of 1,000 or fewer residents and if the coordinating agency consults with any affected coastal resource district in which the area is located; and

(6) be provided by mail, or by electronic format if the person agrees, to each person who has requested from the coordinating agency public notice of

(A) the proposed project; or

(B) any proposed project affecting a specific coastal resource district.

(c) A coordinating agency may issue a joint public notice of a consistency review with another state or federal agency if that notice complies with the minimum requirements of this section. To the extent feasible, and in cooperation with the state or federal agency, the coordinating agency shall ensure that the joint public notice includes a

(1) reference to the agency's authorization; and

(2) solicitation of comments on the agency's authorization, distinct from the solicitation of program comments.

(d) If a public notice of a consistency review is issued that does not comply with the minimum requirements of this section, the coordinating agency shall issue a supplemental notice that does comply.

Section 6.10: Elevation

"Elevation" means a subsequent review under AS 46.40.096(d)(3) of a proposed consistency determination. The elevation process is included at 11 AAC 110.600:

(a) Within five days after the coordinating agency issues a proposed consistency determination or proposed consistency response, a resource agency, applicant, or affected coastal resource district that does not concur with the proposed consistency determination or consistency response may

request an elevation to the commissioner of the proposed consistency determination or consistency response.

(b) An elevation is limited to consideration of

(1) the proposed consistency determination or consistency response regarding whether the project is consistent with the enforceable policies of the program; or

(2) any alternative measure or other project modification that would achieve consistency with the enforceable policies of the program.

(c) A request for elevation must

(1) be in writing;

(2) be received by the coordinating agency within five days after the requestor receives the proposed consistency determination or consistency response; and

(3) explain the requestor's concern, including any addition of or modification to an alternative measure identified in the proposed consistency determination or proposed consistency response that would achieve consistency with the enforceable policies of the program.

(d) Upon receipt of a request for elevation in accordance with (a) - (c) of this section, the coordinating agency shall

(1) distribute the request for elevation to each review participant, the applicant, and each person who submitted timely comments;

(2) suspend in writing the review schedule by no more than 45 days; and

(3) if the reviewing agency is not the office, transfer the elevation process to the office.

(e) The commissioner may act on a request for elevation or may delegate the authority to a state officer or employee in or outside the department to act on the elevation.

(f) The office shall invite the coordinating agency, the resource agencies, the applicant, and any affected coastal resource district to participate in, and may invite any other affected person to attend, an elevation meeting with the commissioner or delegee to resolve the elevation requestor's concerns.

(g) An attendee may present written materials and testimony or may rely on the existing project record at the elevation meeting. The elevation meeting must be recorded electronically.

(h) After the elevation meeting but within 45 days after receipt of the request for elevation under (a) of this section, the commissioner or delegee will issue a written decision with findings of fact. The coordinating agency shall then

(1) render a final consistency determination or consistency response that reflects the decision of the commissioner or delegee on the issue raised by the request for elevation; and

(2) distribute the final consistency determination or consistency response to each review participant, the applicant, each person who submitted timely comments under 11 AAC 110.510(a) and, if applicable, 11 AAC 110.510(b), and any other affected person who was invited to attend the elevation meeting by the office.

A request for elevation is directed to the agency coordinating the consistency review, but the elevation will be decided by the DNR Commissioner. The agency coordinating the consistency review will invite the coordinating agency, the resource agencies, the applicant, any affected coastal resource district to participate in, and any other affected person to attend a tape-recorded elevation meeting with the commissioner or delegee. Attendees may present written materials and testimony or may rely on the existing project record. Within 45 days after receipt of the request for elevation, the commissioner or delegee will issue a written decision with findings of fact, and the coordinating agency shall then renders a final consistency determination.

If a federal agency requests an elevation of the proposed consistency response, the federal agency or OPMP may request that OCRM, under 15 C.F.R. 930.111, assist in the elevation. 11 AAC 110.340.

Section 6.11: ABC List

AS 46.40.096(m) requires that DNR establish in regulation the state resource agency permits and federal permits that trigger a consistency review. The subsection also directs DNR to establish by regulation categories and descriptions of uses and activities that are determined to be consistent with the ACMP or that would be made consistent with the inclusion of standard alternative measures. The section directs that these categories and descriptions of uses and activities be reviewed by DNR and made as broad as possible so as to minimize the number of projects that must undergo an individualized consistency review. AS 46.40.096(m) establishes the statutory authority for the ABC List which has been part of the ACMP consistency regulations since 1984.

The *List of Expedited Consistency Reviews and State Authorizations Subject to the ACMP* (ABC List), as incorporated into the ACMP, was adopted by reference as part of the regulation changes. The adoption by reference occurs at the following sections: 11 AAC 110.710 - adoption of the "A List" (the categorically consistent determinations for expedited consistency reviews); 11 AAC 110.730 - adoption of the "B List" (the generally consistent determinations for expedited consistency reviews); and 11 AAC 110.750 - adoption of the "C List" (the list of state resource

agency authorizations that authorize activities that may have a reasonably foreseeable direct or indirect effect on a coastal use or resource).

The ABC List was formerly approved by OCRM as a program change to the ACMP in 1995, with minor modifications approved in 1999 and 2002. As part of the adoption process of the ABC List into the proposed regulation changes, technical edits and updates reflecting prior consistency review determinations were made.

The regulations governing the development, review, and implementation of those items included on the ABC List can be found at 11 AAC 110.700 – 11 AAC 110.780.

Section 6.12: Emergency Expedited Consistency Reviews

Within Alaska's 44,500 coastal shoreline miles, there are occasionally emergencies that occur where an expedited review is necessary for the immediate preservation of the public peace, health, safety, or general welfare. In those cases, the coordinating agency, in consultation with the resource agencies and any affected coastal resource district, may expedite a consistency review under 11 AAC 110 as necessary to meet the emergency. The process and requirements for an emergency expedited consistency review can be found at 11 AAC 110.900.

Section 6.13: Phasing

AS 46.40.094(a)(2) describes how a project may be reviewed for consistency with the ACMP in "phases." The amendment broadened the phasing statute to allow projects other than traditional oil and gas leasing projects to be reviewed in phases. The phasing test is changed from whether future information is "obtained in the course of a phase" to whether the information "was not available to the project applicant at the time of the previous phase." This change makes the language consistent with the federal coastal management regulations allowing for phasing of federal activities subject to a consistency review in 15 C.F.R. 930.36(d).

It is important to note that the test for phasing is whether the information is available to the applicant, not whether the applicant chooses to obtain the information or make the information available.

Section 6.14: Managing Impacts From Energy Facilities

"Uses of state concern" are defined at AS 46.40.210(12) as "those land and water uses that would significantly affect the long-term public interest." Uses of state concern are defined to include:

> *(A) uses of national interest, including the use of resources for the siting of ports and major facilities that contribute to meeting national energy needs, construction and maintenance of navigational facilities and systems, resource development of federal land, and national defense and related security facilities that are dependent upon coastal locations;*
>
> *(B) uses of more than local concern, including those land and water uses that confer significant environmental, social, cultural, or economic benefits or burdens beyond a single coastal resource district;*
>
> *(C) the siting of major energy facilities, activities pursuant to a state or federal oil and gas lease, or large-scale industrial or commercial development activities that are dependent on a coastal location and that, because of their magnitude or the magnitude of their effect on the economy of the state or the surrounding area, are reasonably likely to present issues of more than local significance;*
>
> *(D) facilities serving statewide or interregional transportation and communication needs; and*
>
> *(E) uses in areas established as state parks or recreational areas under AS 41.21 or as state game refuges, game sanctuaries, or critical habitat areas under AS 16.20.*

Considered within that definition are "major facilities that contribute to meeting national energy needs" and "major energy facilities." The ACMP has defined "major energy facility" at 11 AAC 112.990(14):

> *(A) means a development of more than local concern carried out in, or in close proximity to, the coastal area, that is:*
>
> *(i) required to support energy operations for exploration or production purposes;*
>
> *(ii) used to produce, convert, process, or store energy resources or marketable products;*
>
> *(iii) used to transfer, transport, import, or export energy resources or marketable products;*
>
> *(iv) used for in state energy use; or*
>
> *(v) used primarily for the manufacture, production, or assembly of equipment, machinery, products, or devices that are involved in an activity described in (i)-(iv) of this subparagraph;*
>
> *(B) includes marine service bases and storage depots, pipelines and rights of way, drilling rigs and platforms, petroleum or coal separation,*

treatment, or storage facilities, liquid natural gas plants and terminals, oil terminals and other port development for the transfer of energy products, petrochemical plants, refineries and associated facilities, hydroelectric projects, other electric generating plants, transmission lines, uranium enrichment or nuclear fuel processing facilities, geothermal facilities, natural gas pipelines and rights-of-way, natural gas treatment and processing facilities, and infrastructure related to natural gas treatment and processing facilities.

As a planning function, 11 AAC 114.250(e) states that "a district shall consider and may designate, in cooperation with the state, sites suitable for the development of major energy facilities." As well, 11 AAC 112.230(a) provides the district with the planning criteria on which the siting of major energy facilities must be based. A district, through the planning process of 11 AAC 114, may designate general or specific sites that are suitable for the development of major energy facilities. However, a district's failure to designate areas within their coastal zone boundaries does not translate to a prohibition of locating major energy facilities within the district. Rather, any proposed major energy facility must still be reviewed for consistency under 11 AAC 110 and be found consistent with the ACMP enforceable policies, including those of the coastal district and the state, and specifically the Energy Facilities standard at 11 AAC 112.230.

For any proposed major energy facility that is subject to the consistency review process under 11 AAC 110, the facility must be found consistent with the ACMP enforceable policies, including those of the coastal district and the state, and specifically the state's Energy Facilities standard at 11 AAC 112.230, which requires that siting and approval be based on the following standards:

(1) site facilities so as to minimize adverse environmental and social effects while satisfying industrial requirements;

(2) site facilities so as to be compatible with existing and subsequent adjacent uses and projected community needs;

(3) consolidate facilities;

(4) consider the concurrent use of facilities for public or economic reasons;

(5) cooperate with landowners, developers, and federal agencies in the development of facilities;

(6) select sites with sufficient acreage to allow for reasonable expansion of facilities;

(7) site facilities where existing infrastructure, including roads, docks, and airstrips, is capable of satisfying industrial requirements;

(8) select harbors and shipping routes with least exposure to reefs, shoals, drift ice, and other obstructions;

(9) encourage the use of vessel traffic control and collision avoidance systems;

(10) select sites where development will require minimal site clearing, dredging, and construction;

(11) site facilities so as to minimize the probability, along shipping routes, of spills or other forms of contamination that would affect fishing grounds, spawning grounds, and other biologically productive or vulnerable habitats, including marine mammal rookeries and hauling out grounds and waterfowl nesting areas;

(12) site facilities so that design and construction of those facilities and support infrastructures in coastal areas will allow for the free passage and movement of fish and wildlife with due consideration for historic migratory patterns;

(13) site facilities so that areas of particular scenic, recreational, environmental, or cultural value, identified in district plans, will be protected;

(14) site facilities in areas of least biological productivity, diversity, and vulnerability and where effluents and spills can be controlled or contained;

(15) site facilities where winds and air currents disperse airborne emissions that cannot be captured before escape into the atmosphere;

(16) site facilities so that associated vessel operations or activities will not result in overcrowded harbors or interfere with fishing operations and equipment.

The open nature of state proceedings under the Administrative Procedures Act at AS 44.62, the consistency review process of 11 AAC 110, and the district planning process at 11 AAC 114 assures that all persons and organizations wishing to be involved in the planning process for managing the impacts of energy facilities within the coastal zone will have the opportunity to do so.

Chapter 7: Areas of Particular Concern of the ACMP

Section 7.1: Designation of Areas of Particular Concern

In Alaska, as in many other states, much of the coastal area can be managed with only general land and water use controls. This in itself is expensive, but the fact that the effort must be spread over the entire coastal area results in an inability to properly recognize and manage (with overall program authorities) certain areas that have unique values or fragile characteristics that make them, on balance, more in need of special attention. By adding a special area identification and management element to a state coastal program, the financial and managerial resources of the program may be focused on such areas and detailed management programs may be developed. Special area identification and management takes place in a process which recognizes the other interests that might be affected by such management, assuring that the value of the area is protected without causing other unnecessary impacts. In light of these considerations, the ACMP has its own special area identification, designation, and management element, and can participate in similar programs under other authorities.

There are six methods by which areas of particular concern can be identified/designated and managed in Alaska's coastal area. These include:

1. OPMP approval under 11 AAC 114.400 – 11 AAC 114.430 of special area designations as areas which merit special attention (AMSAs) or special area management plans (SAMPS);
2. OPMP approval under 11 AAC 114.250(b)-(i) of areas of the coastal zone designated by a district for the likelihood of occurrence of natural hazards, recreation use, tourism use, the sites suitable for the development of energy facilities, sites suitable for the development of facilities related to commercial fishing and seafood processing, where subsistence use is an important use of coastal resources, and important habitat within the coastal district and coastal area;
3. DNR identification under 11 AAC 112.270(a) where subsistence is an important use of coastal resources;
4. DNR identification under 11 AAC 112.300(c)(1)(B) as an important habitat within the coastal area;
5. DFG identification under 11 AAC 112.300(c)(1)(C) as state game refuges, state game sanctuaries, state range areas, or fish and game critical habitat areas under AS 16.20; or
6. Other special area designations proposed by state and federal agencies which offer such proposals under authorities other than those provided by the ACMP.

Within the ACMP regulations, districts may designate AMSAs, SAMPs, or designated areas in their programs. Per the legislative definition provided in AS 46.40.210(1) and the additional categories included in 11 AAC 114.410. AS 46.40.210(1) reads:

> *(A) areas of unique, scarce, fragile of vulnerable natural habitat, cultural value, historical significance, or scenic importance;*
> *(B) areas of high natural productivity or essential habitat for living resources;*
> *(C) areas of substantial recreational value or opportunity;*
> *(D) areas where development of facilities is dependent upon the utilization of, or access to, coastal waters;*
> *(E) areas of unique geologic or topographic significance which are susceptible to industrial or commercial development;*
> *(F) areas of significant hazard due to storms, slides, floods, erosion or settlement; and*
> *(G) areas needed to protect, maintain, or replenish coastal land or resources including coastal flood plains, aquifer recharge areas, beaches and offshore sand deposits.* AS 46.40.210(1).

11 AAC 114.410(b) reads:

> *(b) An area which merits special attention includes the following, in addition to the categories included as examples in AS 46.40.210:*
> *(1) an area important for subsistence uses;*
> *(2) coastal resources important to subsistence uses;*
> *(3) an area with special scientific value, including an area where an ongoing research project could be jeopardized by development or a conflicting use or activity; and*
> *(4) a potential estuarine or marine sanctuary.*

AMSA designations must contain all of the information called for by 11 AAC 114.420-.430, and may be in response to values listed in AS 46.40.210(1) or 11 AAC 114.420(b). Thus, per 11 AAC 114.420, for an AMSA to be designated inside the district, the plan must include a description of:

> *(1) how the area meets the descriptions contained in AS 46.40.210 or 11 AAC 114.410;*
> *(2) a map showing the geographical location, surface area, and, if appropriate, bathymetry of the area, along with a legal and narrative*

description of the boundaries and a justification of the size of the area which merits special attention;

(3) the district plan elements described in 11 AAC 114.200 – 11 AAC 114.290;

(4) a summary of the resource values and use conflicts, if any, in the area; and

(5) an analysis showing that designation of an area which merits special attention is the district's preferred planning and management mechanism for meeting the objectives of the proposal and the program.

In addition, "a plan for an area which merits special attention inside a district must preserve, protect, enhance, or restore each value for which the area was designated."

Similarly, per 11 AAC 114.430, for an AMSA outside the district, the plan must include a description of:

(1) the basis for designation;

(2) a map showing the geographical location of the area, a legal and narrative description of the area's boundaries, and a justification for the size of the area;

(3) a summary of the resource values and use conflicts, if any, in the area;

(4) a statement of the purpose and objectives to be met through a plan for an area which merits special attention;

(5) a tentative schedule for completion of planning tasks and reviews;

(6) the source of funding for developing the area which merits special attention plan;

(7) a list of persons with interests in or adjacent to the proposed area who may be affected by the proposed designation and a description of how these persons would be involved in plan development;

(8) a letter commenting on the proposed area from

(A) a state agency that would implement the plan for that area; or

(B) a district, state agency, or federal agency that is interested, or identified as interested, in the development of that plan;

(9) a written summary of the issues discussed and the participants involved in the meeting that the person recommending the area which merits special attention outside of a district is required to satisfy under (a) of this section; and

(10) an analysis showing that a plan for an area which merits special attention is the planning and management mechanism that the state agencies

responsible for implementation prefer for meeting the objectives of the proposal and the program.

Per 11 AAC 114.400, SAMPS manage a specific resource or activity within the district. Examples of a special area management plan include a harbor management plan, an ocean resource management plan, a public use management plan, a recreation management plan, a watershed management plan, and a wetlands management plan. A special area management plan may provide for increased specificity in protecting significant natural resources, coastal-dependent economic growth, improved protection of life and property in hazardous areas, and improved predictability in governmental decision making. SAMPS are developed under 11 AAC 114.400, and require DNR approval as described in 11 AAC 114.300-.360.

Within a coastal district plan, a district may designate one of the areas listed under 11 AAC 114.250 and develop enforceable policies applicable to that designated area pursuant to the requirements of 11 AAC 114.270, including:

(b) A district shall consider the likelihood of occurrence of natural hazards in the coastal area and may designate natural hazard areas.

(c) A district shall consider and may designate areas of recreational use. Criteria for designation of areas of recreational use are

(1) the area receives significant use by persons engaging in recreational pursuits; or

(2) the area has potential for recreational use because of physical, biological, or cultural features.

(d) A district shall consider and may designate areas of tourism use. Criteria for designation of areas of tourism use are the area receives or has the potential to receive significant use by the visitor industry using cruise ships, floatplanes, helicopters, buses, or other means of conveying groups of persons to and within the area.

(e) A district shall consider and may designate, in cooperation with the state, sites suitable for the development of major energy facilities.

(f) A district shall consider and may designate areas of the coast suitable for the location or development of facilities related to commercial fishing and seafood processing.

(g) Except in nonsubsistence areas as identified under AS 16.05.258, a district may, after consultation with appropriate state agencies, federally recognized Indian tribes, Native corporations, and other appropriate persons or groups, designate areas in which a subsistence use is an important use of coastal resources and designate such areas.

(h) A district shall consider and may designate portions of habitat areas listed in 11 AAC 112.300(a)(1) – (8) and other habitats in the coastal area as important habitat if

(1) the use of those designated portions have a direct and significant impact on coastal water; and

(2) the designated portions are shown by written scientific evidence to be significantly more productive than adjacent habitat.

(i) A district shall consider and may designate areas of the coast that are important to the study, understanding, or illustration of national, state, or local history or prehistory.

Section 7.2: Inventory of Areas of Particular Concern

Similar to the approved 1979 ACMP FEIS, the ACMP does not include a comprehensive inventory of all areas of particular concern. The coastal area of Alaska encompasses enormous geographic area, and as such, an exhaustive inventory of all areas of particular concern would be difficult, and has not been conducted. In addition, the required coastal district plan revisions may result in the incorporation and elimination of some of these areas of particular concern into a coastal district plan.

The ACMP includes an inventory of those areas of particular concern specifically described within the ACMP regulations at 11 AAC 112 and 11 AAC 114.

There is an existing list of 33 designated areas which merit special attention and special area management plans in the ACMP Guidebook Series (guidebook 4). The boundaries for these areas are included in the Coastal Zone Boundary geographic information system maps available on the ACMP website at www.alaskacoast.state.ak.us. The complete listing of those AMSAs and SAMPs is as follows:

1. Anchorage Wetlands Management Plan
2. Andesite Dike at Potter's Marsh on Old Seward Highway
3. Bird Creek Regional Park
4. Eagle River Valley Lowlands
5. Fish Creek Estuary
6. Old Girdwood Townsite South of Seward Highway
7. Point Campbell Dunes and Delta
8. Point Campbell-Point Woronzof Coastal Wetlands
9. Point Woronzof Bluffs
10. Port of Anchorage Area

11. Seward Highway/Turnigain Arm Scenic Corridor
12. Chaik-Whitewater Bay
13. Hood Bay
14. Mitchell Bay
15. Nushagak/Mulchatna Rivers Recreation Management Plan (co-sponsored by Bristol Bay CRSA and Lake and Peninsula Borough)
16. Eyak Lake
17. Port Chilkoot/Portage Cove
18. Hetta Cove/Eek Inlet
19. Hydaburg River/Tidelands
20. Jackson Island
21. McFarland Islands/Dunbar Inlet
22. Meares Passage/Arena Cove
23. Saltery Point/Crab Trap Cove
24. Downtown Waterfront (Juneau)
25. Juneau Wetlands Management Plan
26. Port Graham/Nanwalek
27. Point Mackenzie
28. Sitka Public Use Management Plan
29. Swan Lake
30. Pullen Creek
31. Port of Skagway
32. Skagway River
33. Yakutania Point

Under AS 16.20, the Department of Fish and Game (DFG) has established 30 state game refuges, game sanctuaries, range areas and critical habitat areas. A listing of those areas is as follows:

1. Cape Newenham State Game Refuge
2. Walrus Islands State Game Sanctuary
3. Egegik State Critical Habitat Area
4. Pilot Point State Critical Habitat Area
5. Cinder River State Critical Habitat Area
6. Port Heiden State Critical Habitat Area
7. Port Moller State Critical Habitat Area
8. Izembek State Game Refuge
9. Tugidak Island State Critical Habitat Area
10. McNeil River State Game Refuge
11. McNeil River State Game Sanctuary
12. Kachemak Bay State Critical Habitat Area
13. Homer Airport State Critical Habitat Area

14. Fox River Flats State Critical Habitat Area
15. Anchor River/Fritz Creek State Critical Habitat Area
16. Clam Gultch State Critical Habitat Area
17. Kalgin Island State Critical Habitat Area
18. Redoubt Bay State Critical Habitat Area
19. Trading Bay State Game Refuge
20. Susitna Flats State Game Refuge
21. Anchorage Coastal Wildlife Refuge
22. Palmer Hay Flats State Game Refuge
23. Goose Bay State Game Refuge
24. Willow Mountain State Critical Habitat Area
25. Copper River Delta State Critical Habitat Area
26. Yakataga State Game Refuge
27. Chilkat River State Critical Habitat Area
28. Dude Creek State Critical Habitat Area
29. Mendenhall Wetlands State Game Refuge
30. Stan Price State Wildlife Sanctuary

As described above, the amendment to the ACMP has increased the ability for participants to identify and designate areas of particular concern through two new means. First, coastal districts may designate areas under 11 AAC 114.250(b)-(i) for the likelihood of occurrence of natural hazards, recreation use, tourism use, the sites suitable for the development of energy facilities, sites suitable for the development of facilities related to commercial fishing and seafood processing, where subsistence use is an important use of coastal resources, and important habitat within the coastal district and coastal area. Each of these areas of particular concern should be described and/or mapped in the coastal district plan. Second, special areas can be identified within the consistency review process by DNR under 11 AAC 112.210(a) for the likelihood of occurrence of natural hazards, under 11 AAC 112.270(a) where subsistence is an important use of coastal resources, and under 11 AAC 112.300(c)(1)(B) as an important habitat within the coastal areas. Due to the enormity of the state's coastal area, a comprehensive inventory of all areas of particular concern has not been conducted. The capacity for DNR to identify special areas for natural hazards, subsistence use areas, and important habitat during the consistency is a very important tool that allows for the specific management of the uses activities that may have an impact on special areas or resources that had not previously been designated.

OPMP will be updating the Coastal Zone Boundary maps after the coastal district plans, AMSAs, and SAMPs are revised and approved. The DFG has developed a map of those particular areas described in 11 AAC 112.300(c)(1)(C);

OPMP will also include the DFG special areas on those Coastal Zone Boundary maps.

The consistency review process described under 11 AAC 110 sets out the process for evaluating uses, including those uses of the lowest priority within an area of particular concern.

Section 7.3: Mapping of Areas of Particular Concern

For AMSAs and SAMPs that are developed under 11 AAC 114.400 – 11 AAC 114.430, the plan must be developed and approved as described in 11 AAC 114.300 – 11 AAC 114.360, and must contain the district plan elements described in 11 AAC 114.200 – 11 AAC 114.290. These plans must include a map and description of the boundaries of the coastal zone subject to the area in accordance with 11 AAC 114.220, and must include a map showing the geographical location, surface area, and if appropriate, bathymetry of the area, along with a legal and narrative description of the boundaries and a justification of the area. 11 AAC 114.420(b)(2) and 11 AAC 114.430(b)(2). In addition, for areas designated by a coastal district under 11 AAC 114.250, as well as AMSAs and SAMPs, the district enforceable policies developed under 11 AAC 114.270(g) for application within those areas, the "area subject to these policies must be described or mapped at a scale sufficient to determine whether a use or activity is located within the area. A description or map developed under this subsection must be referenced in the applicable enforceable policy and is an enforceable component of the district plan." 11 AAC 114.270(g).

As discussed in the preceding response, these areas (AMSAs, SAMPs, and district designated areas) will be identified in the Coastal Zone Boundary geographic information system maps and the Department of Fish and Game Special Area maps available on the ACMP website at www.alaskacoast.state.ak.us.

For those "natural hazard" areas identified by DNR under 11 AAC 112.210(a), "subsistence use" areas identified by DNR under 11 AAC 112.270(a), and "important habitat" areas identified by DNR under 11 AAC 112.300(c)(1)(B), the areas are identified during the consistency review of the proposed project under 11 AAC 110, but are not included nor considered as a formal designation of an area of particular concern that requires the establishment of boundaries or listing within an inventory. The capacity for DNR to identify these special areas for natural hazards and important habitat during the consistency is a very important tool that allows for the specific management of the uses activities that may have an impact on special areas or resources that had not previously been designated. As described previously, the enormity of the state's coastal area prevents a comprehensive

analysis, identification, and inventory of all those areas of particular concern that may be more deserving of specialized management. The consistency review of a proposed project provides the opportunity to look specifically at that proposed location, and manage the resources accordingly.

For those areas identified in 11 AAC 112.300(c)(1)(C) by the DFG under AS 16.20 as state game refuges, state game sanctuaries, state range areas, or fish and game critical habitat areas, the DFG has mapped those areas; OPMP will also include the DFG special areas on those Coastal Zone Boundary maps. In addition, the coastal districts are charged with describing or mapping major land and resource ownership, jurisdiction, and management responsibilities within or adjacent to the district. These DFG special management areas should be described in each of the coastal district plans.

Section 7.4: Purpose for Designation of Areas of Particular Concern

The regulations at 11 AAC 114 require that a district plan (including designated areas, AMSAs, and SAMPs) include the plan elements described at 11 AAC 114.200-290. Additional requirements for justification apply for AMSAs at 11 AAC 114.420-430.

As required by 11 AAC 114.420(b), a plan for an AMSA inside a district must include

> *(1) how the area meets the descriptions contained in AS 46.40.210 or 11 AAC 114.410;*
> *(2) a map showing the geographical location, surface area, and, if appropriate, bathymetry of the area, along with a legal and narrative description of the boundaries and a justification of the size of the area which merits special attention;*
> *(3) the district plan elements described in 11 AAC 114.200 - 11 AAC 114.290;*
> *(4) a summary of the resource values and use conflicts, if any, in the area; and*
> *(5) an analysis showing that designation of an area which merits special attention is the district's preferred planning and management mechanism for meeting the objectives of the proposal and the program.*

An AMSA inside a district must preserve, protect, enhance or restore each value for which the area was designated. (11 AAC 114.420(d)).

In addition to the items required for an AMSA under 11 AAC 114.420, 11 AAC 114.430 requires that AMSAs outside districts also include the basis for the designation (11 AAC 114.430(b)(1)) and a statement of the purpose and objectives to be met through a plan for an AMSA (11 AAC 114.430(b)(4)).

Each designated area, SAMP, and AMSA inside or outside of a coastal district will contain the planning elements required at 11 AAC 114.200 – 11 AAC 114.290, and will link the issues, goals and objectives, resource inventory and analysis, subject uses, proper and improper uses to the enforceable polices. The nature of the concern, the reason for the designation of the area, and the means to resolve the concerns are all captured within the planning processes and planning documents. The application of the enforceable policies developed for these areas through the consistency review process of 11 AAC 110 achieves the purpose of the designation for these areas of particular concern.

It is important to note that that the substance, criteria, and planning process for SAMPs and AMSAs have not changed in this amendment to the ACMP. The statutory and regulatory revisions of the amended ACMP provide the new mechanism of "designating areas" to afford additional protection to special areas. The existing SAMPS and AMSAs in effect were approved by NOAA, and do address the nature of the concern, why the area was designated, and how ACMP addresses and resolves the concerns for which areas are designated. As is standard practice, OPMP will continue to provide guidance to coastal districts and ensure that these criteria are met as all of the district plans, AMSA and SAMPS are amended in accordance with the statutes and regulations governing the ACMP.

Section 7.5: Priority of Uses Within Areas of Particular Concern

Under the structure of the ACMP, the prioritization of uses subject to designated areas, AMSAs, and SAMPS are accomplished through the development of district enforceable policies that can specify which uses and activities are allowed or not allowed, and through the application of the state standards at 11 AAC 112 during the consistency review process under 11 AAC 110.

The coastal district plan requirements at 11 AAC 114.260 which apply to designated areas, AMSAs and SAMPS, require districts to "describe the uses and activities, including uses of state concern, that will be considered proper, and the uses and activities, including uses of state concern, that will be considered improper, within the district's coastal zone, including land and water use designations." Coastal districts can also write enforceable policies that will be used to determine whether a specific land or water use or activity will be allowed within designated areas, AMSAs or SAMPs. (11 AAC 114.270(g)). This provision of the

regulations affords the highest level of protection to areas of particular concern under the ACMP, and enables the coastal district (or others, if the area is an extraterritorial AMSA) to prioritize uses and activities, including uses of state concern.

The prioritization of uses and activities is also ostensibly addressed through certain ACMP standards, as follows:

- The Coastal Development (11 AAC 112.200) standard requires districts and state agencies to give priority to uses and activities that are water-dependent, water-related; and then of lowest priority, those where there is no practicable inland alternative to meet the public need for the use or activity.
- The Coastal Access (11 AAC 112.220) standard requires that public access is maintained, or where, appropriate, increased to and along coastal waters. This, in essence, gives coastal access a high priority.
- The Energy Facilities (11 AAC 112.230) standard requires the siting of facilities such that all areas of particular scenic, recreational, environmental, or cultural value, identified in district plans, will be protected. These "areas" could be developed as AMSAs, SAMPS, or designated areas.

Chapter 8: Public Participation in the Development and Amendment of the ACMP

Section 8.1: Public Information and Participation in the Development and Amendment of the ACMP

OPMP maintains the ACMP web page at www.alaskacoast.state.ak.us, and has done so for many years. This website, familiar to ACMP participants, was used extensively during the development of the ACMP revisions (statutory and regulatory revisions) to share information

- regarding the legislative hearings
- provided to the legislative committee members
- regarding the regulatory development and review process
- regarding the opportunities for public comment and input
- on the program design, its content, and its status

In addition to the information shared through the ACMP web site, there were many actions taken specific to soliciting full participation by state and local governments, interested parties, and the general public.

On February 12, 2003, Governor Frank Murkowski introduced Executive Order (EO) 106 into the Alaska State Legislature, Senate and House of Representatives. This is the proper legal province of an executive order, per article III, section 23 of the Alaska Constitution:

> The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, those orders become effective at a date thereafter to be designated by the governor.

EO 106 transferred the Alaska Coastal Policy Council from the Office of the Governor to the Department of Natural Resources, and transferred the function of the Division of Governmental Coordination within the Office of the Governor to the Department of Natural Resources. These transfers were done (a) in the best interests of efficient administration; (b) to permit better access to scientific information and state personnel with technical expertise on projects affecting the coastal zone; and (c) to permit closer coordination to improve the planning process for projects affecting the coastal zone.

Though there were no legislative hearings on EO 106, the legislature did consider the substance of EO 106 in the 2003 joint session, did not disapprove that order, and the order became effective on April 15, 2003.

During the 2003 Alaska Legislative Session, the Alaska State Legislature provided for the participation of all interested parties in the development and passing of additional ACMP statutory revisions contained in HB 191, SB 143, HB 69 and HB 86. The legislative hearing process for each bill was open to the public and notification to interested parties was available by reviewing the legislative calendar and the ACMP web site. Additional DNR/ACMP e-mail notifications were provided to interested parties outlining the opportunity to participate in the legislative hearing process.

House Bill 191. Title: "An Act relating to the Alaska coastal management program and to policies and procedures for consistency reviews and the rendering of consistency determinations under that program; eliminating the Alaska Coastal Policy Council; annulling certain regulations relating to the Alaska coastal management program; and providing for an effective date." Hearings were held in

- House Fisheries on 3/17/03
- House Fisheries on 3/26/03
- House Resources on 4/16/03
- House Resources on 4/23/03
- House Resources on 4/28/03
- House Judiciary on 5/2/03
- House Finance on 5/03/03
- Passed in House on 5/7/03
- Senate Resources on 5/09/03
- Passed in Senate on 5/14/03.

Senate Bill 143. Title: "An Act relating to the Alaska coastal management program and to policies and procedures for consistency reviews and the rendering of consistency determinations under that program; relating to the functions of coastal resource service areas; creating an Alaska Coastal Program Evaluation Council; eliminating the Alaska Coastal Policy Council; annulling certain regulations relating to the Alaska coastal management program; relating to action based on private nuisance; relating to zoning within a third class borough covered by the Alaska coastal management program; and providing for effective dates." This bill was the companion to the HB 191. Though hearings in the Senate were held on SB 143, the substantive hearings and subsequent proposed amendments

were largely accomplished in the House on HB 191. Hearings for SB 143 were held in

- Senate Resources on 4/23/03
- Senate Resources on 4/25/03
- Senate Resources on 4/28/03.

House Bill 69. Title: "An Act relating to regulation of shallow natural gas leasing and closely related energy projects; and providing for an effective date." Hearings were held in

- House Oil and Gas on 2/06/03
- House Resources on 2/07/03
- Passed in House on 2/12/03
- Senate Resources on 2/24/03
- Senate Resources on 3/28/03
- Passed in Senate on 4/25/03, as amended
- Passed in House on 5/5/03, as amended.

House Bill 86. Title: "An Act relating to state permitted projects." Hearings were held in

- House Resources on 2/21/03
- House Resources on 3/7/03
- House Resources on 4/2/03
- House Resources on 4/4/03
- House Judiciary on 4/23/03
- House Judiciary on 4/28/03
- Passed in House on 5/2/03
- Senate Judiciary on 5/7/03
- Senate Judiciary on 5/13/03
- Senate Judiciary on 5/16/03
- Senate Judiciary on 5/17/03
- Passed in Senate on 5/19/03, as amended
- Passed in House on 5/20/03, as amended.

In each of these legislative committee scheduled hearings on the bills, the bills were discussed by the committee members. In many of the hearings, public testimony taken, considered, and amendments were offered, considered, and passed as appropriate.

To assist the legislature and the public with better understanding of the substance of HB 191 and its purpose, a public information packet was prepared for the legislative process. This packet of information included an overview if the legislation, key components of the legislation, a timeline for required actions, comparison between versions of the bill including explanations of the amendments, and sample enforceable policies. This packet, in its various forms, was distributed to the legislative committee members and made available to the general public, including the coastal districts and others that expressed interest in the materials. The substance of the informational packet changed very little, though minor clarifications and specific tailoring to the legislative committee were made.

As mandated by HB 191, DNR embarked on the effort to revise and overhaul the ACMP regulations at 6 AAC 50, 6 AAC 80, and 6 AAC 85. Again, the information developed regarding the regulatory revisions were made available through the ACMP web site. The following steps represent additional opportunities DNR has taken to make the ACMP program information available to all interested parties in the design, content and status of the program and regulatory revisions:

- The Annual Coastal Conference was held in Juneau during May 5-7, 2003. Several of the conference sessions included discussion and dialogue opportunities with DNR representatives and the ACMP participants at the conference. Such sessions included topics as "New 6 AAC 50 Regulations" and "Change Exchange."
- On October 9, 2003, ACMP staff initiated a teleconference with coastal district representatives to update them on the passing of HB 191 and the coming changes to the ACMP as mandated by HB 191. At the teleconference, communication options and district participation opportunities regarding the changes were briefed and discussed.
- In October, 2003, DNR formed the "ACMP Regulation Review Team" to provide a weekly forum for dialogue on the development of the regulations. This team included representatives from OCRM, all of the state agency participants, coastal district representatives, the resource development community, and the environmental community. This forum allowed the team to have input on the draft regulations as they were being contemplated and drafted. The team met weekly during November and December 2003.
- On November 26, 2003, a "Guidance Document" memorandum was issued to assist ACMP participants and the public in further understanding the changes resulting from HB 191, and providing interim guidance until the regulation revisions implementing the statutory changes could be fully crafted and finalized.

- ACMP staff held a teleconference with district representatives on December 1, 2003 to help prepare the districts for the upcoming regional district conferences. The purpose of the teleconference was to familiarize the districts with HB 191 and the regulations revision effort so they could actively engage in a discussion and the development of the regulations revisions.
- In December 2003, DNR held two regional district conferences, one in Juneau and one in Anchorage. ACMP participants and the members of the public were invited and attended. At both meetings, the DNR contractors tasked with providing an initial draft of the revised regulations exhaustively detailed the program changes required by HB 191, discussed possible regulatory changes to implement the bill, convened breakout sessions to enable participants to work through examples using proposed new procedures and standards, and took detailed notes of comments and reactions from the districts and other conference participants.
- In February 2004, DNR hosted the annual coastal conference in Anchorage in conjunction with the Alaska Forum on the Environment. Draft regulations were presented to the conference participants as an informal opportunity for dialogue and discussion. Over the course of the February 11-13, 2004, conference, several sessions addressed the draft regulation revisions and the changes required by HB 191.
- On February 20, 2004, the proposed regulations were released for formal public review and comment under the Alaska Administrative Procedures Act (APA) at AS 44.62. The comment period was structured to provided interested parties (federal and state agencies, local governments, and other interested parties and individuals, public and private) 45 days to review the proposed regulations and provide written comments to DNR, while remaining within the confines of the legislatively mandated deadlines for completing the regulation revisions. During the public review and comment period, DNR staff was available (within the confines of APA requirements) to answer general questions from the public regarding the regulations. The comment period closed on April 2, 2004, with 38 agencies, organizations, and members of the public offering comments on the proposed regulations.
- On March 24, 2004, an additional package of proposed regulations addressing the applicability of the statewide standards was released for public review and comment per the APA. The comment period closed on April 23, 2004, with three members of the public submitting comments on the proposed regulations.

- As part of the regulatory adoption process, DNR completed a response document that addressed the general themes of the public comments that were submitted, and provided DNR's rationale for the final regulations.
- Following adoption of the regulations by DNR and filing of the regulations by the lieutenant governor, the regulations became effective July 1, 2004. DNR staff organized a series of teleconferences with districts and members of the public to explain the regulations and to prepare the districts for evaluating and revising the pertinent sections of their coastal district management plans to comply with HB 191 and the implementing regulations. The teleconferences were scheduled throughout June and July, and addressed many questions raised by the districts regarding the plan evaluation and the grant application process for their plan revisions.
- On August 9, 2004, an additional package of proposed regulations addressing the sequencing process of "avoid, minimize, or mitigate" and other clarifying edits was released for public review and comment per the APA. The comment period closed on September 8, 2004, with 13 agencies, organizations, and members of the public submitting comments on the proposed regulations. The regulations were adopted by DNR and filed by the lieutenant governor, and became effective October 29, 2004.
- DNR organized and held the regional coastal workshop in Anchorage on October 20-22. The focus of the workshop was the district plan revision requirements, including topics on the process for revising a district plan, requirements for enforceable policies, and understanding state and federal agency authorities.
- DNR provided a written response to a number of implementation questions raised by the coastal workshop participants. The "Workshop Responses" document is posted on the ACMP website and workshop participants were notified of the response by e-mail.

During the 2005 Alaska Legislative Session, the Alaska State Legislature provided for the participation of all interested parties in the development and passing of additional ACMP statutory revisions contained in SB 102, and held additional hearings on the ACMP under the auspices of the related House Bill (HB 189). The legislative hearing process for each bill was open to the public and notification to interested parties was available by reviewing the legislative calendar and the ACMP web site. Additional DNR/ACMP e-mail notifications were provided to interested parties outlining the opportunity to participate in the legislative hearing process and addressing the status of the bills.

Senate Bill 102. Title: "An Act repealing the Alaska coastal management program; relating to an extension for review and approval of revisions to the Alaska coastal management program; relating to reviews and modification by the Department of Natural Resources; relating to coastal resource district policies; providing for an effective date by amending the effective date of sec. 45, ch. 24, SLA 2003; and providing for an effective date." Hearings were held in:

- Senate Community and Regional Affairs on 3/18/05
- Senate Resources on 4/25/05
- Senate Finance on 5/3/05
- House Resources on 5/7/05
- House Finance on 5/8/05.

House Bill 189. Title: "An Act relating to an extension for review and approval of revisions to the Alaska coastal management program; providing for an effective date by amending the effective date of sec. 45, ch. 24, SLA 2003; and providing for an effective date." Hearings were held in:

- House Community and Regional Affairs on 4/29/05
- House State Affairs on 5/3/05.

On May 20, 2005, OPMP held a public hearing on Alaska's submission of its ACMP amendment request. This hearing was held pursuant to 16 U.S.C. 1455(d)(4) and 15 C.F.R. 923.82(a), and was intended to solicit testimony from all interested members of the public regarding the state's submission of the request to amend the Alaska Coastal Management Program. The hearing was simulcast to all 22 Legislative Information offices (LIO) around the state:

- The Anchorage LIO at 716 W 4 th Avenue, Suite 200
- The Barrow LIO, 119 Bank Building
- The Bethel LIO, 301 Willow Street
- The Cordova LIO, 705 2 nd Street
- The Delta Junction LIO, Jarvis Office Center, Room 218
- The Dillingham LIO, Kangiiqutaq Building
- The Fairbanks LIO, 119 N Cushman, Suite 101
- The Glennallen LIO, 186 Glenn Hwy
- The Homer LIO, 345 W Sterling Hwy, Suite 102A
- The Juneau LIO, State Capitol, Terry Miller Building, Suite 111
- The Kenai Peninsula LIO, 145 Main Street Loop, Suite 217
- The Ketchikan LIO, 50 Front Street, Suite 203
- The Kodiak LIO, 112 Mill Bay Road, Kodiak Plaza Building

- The Kotzebue LIO, 373 2 nd Street, Pillautuq Centre
- The Matsu LIO, 600 E Railroad Ave
- The Nome LIO, 103 Front Street, State Office Building
- The Petersburg LIO, 11B Gjoa Street
- The Seward LIO, 2001 Seward Hwy
- The Sitka LIO, 201 Katlian Street, Suite 200A
- The Tok LIO, W 1 st Street, UAF-Tok Unit 1
- The Valdez LIO, State Office Building, Room 13
- The Wrangell Teleconference Center, 223 Front Street

Oral testimony was allowed to any person who signed up at one of the LIO sites. Individuals unable to travel to one of the LIO sites were able to testify in writing by mailing, emailing, or faxing their written testimony to OPMP. The transcript and audio recording of the public hearing, all written testimony, the LIO sign-up sheets, the public notice of the hearing, and other pertinent information are submitted as part of the request for amendment.

In addition to the numerous formal opportunities to participate in the development and amendment of the ACMP listed above, state officials and various transition teams representing the Governor's Office met numerous times during 2002-2005 with the federal agencies operating in Alaska and affected by the ACMP, the public, members of the participating state agencies, coastal districts, and OCRM. These "meetings" included briefings, presentations, written dialogue, and telephone conversations.

Section 8.2: ACMP Interested Participant Listing

The following is a listing of governmental agencies, regional organizations, port authorities, and public and private organizations likely to be affected by or to have a direct interest in the development and implementation of the ACMP:

Federal Agencies
Department of the Interior
Fish and Wildlife Service
Bureau of Land Management
Minerals Management Service
National Marine Fisheries Service
Environmental Protection Agency
National Park Service
Bureau of Indian Affairs
Federal Highway Administration
United States Coast Guard

United States Forest Service
United States Army Corps of Engineers
United States Geological Survey
Federal Aviation Administration
Federal Energy Regulatory Commission
Nuclear Regulatory Commission
Office of Oceans and Coastal Resource Management

State Agencies
Office of the Governor
Alaska State Legislature
Legislative Affairs Agency
Department of Administration
Department of Commerce, Community, and Economic Development
Department of Environmental Conservation
Department of Fish and Game
Department of Law
Department of Military and Veteran Affairs
Department of Natural Resources
Department of Public Safety
Department of Revenue
Department of Transportation and Public Facilities
University of Alaska
Division of Community Advocacy
Division of Sport Fish
Division of Commercial Fisheries
Division of Subsistence
Division of Wildlife Conservation
Commercial Fisheries Entry Commission
Division of Agriculture
Division of Forestry
Division of Geological and Geophysical Surveys
Division of Mining, Land and Water
Division of Oil and Gas
Division of Parks and Outdoor Recreation
Office of Habitat Management and Permitting
Office of Project Management and Permitting

Coastal Districts / Local Governments
Aleutians East Borough
Aleutians West Coastal Resource Service Area
Bering Straits Coastal Resource Service Area

Bristol Bay Borough
Bristol Bay Coastal Resource Service Area
Ceñaliulriit Coastal Resource Service Area
City and Borough of Haines
City and Borough of Juneau
City and Borough of Sitka
City and Borough of Yakutat
City of Angoon
City of Bethel
City of Cordova
City of Craig
City of Hoonah
City of Hydaburg
City of Kake
City of Klawock
City of Nome
City of Pelican
City of Petersburg
City of St. Paul
City of Skagway
City of Thorne Bay
City of Valdez
City of Whittier
City of Wrangell
Kenai Peninsula Borough
Ketchikan Gateway Borough
Kodiak Island Borough
Lake and Peninsula Borough
Matanuska-Susitna Borough
Municipality of Anchorage
North Slope Borough
Northwest Arctic Borough

<u>Other Interested Parties</u>
Alaska Oil and Gas Association
The Nature Conservancy
Bristol Bay Native Corporation
Association of Village Council Presidents
Aleutian/Pribilof Islands Association, Inc.
Alaska Municipal League
Sealaska Corporation
NANA Regional Corporation, Inc.

Bering Straits Native Corporation
Cook Inlet Region, Inc.
Arctic Slope Regional Corporation
Alaska Center for the Environment
Alaska Miners Association
Alaska Forest Association
Resource Development Council
United Fishermen of Alaska
Alaska Federation of Natives
Trustees for Alaska
Cook Inlet Keeper
Greenpeace
Southeast Alaska Conservation Council
Nancy Wainwright
Tom Lohman
Unocal
British Petroleum
ConocoPhillips Alaska, Inc.
McKie Campbell
Mike Smith
Gabrielle LaRoche
Glenn Gray
Barb Sheinburg
Jan Caufield
Alaska Marine Conservation Corps
Prince William Sound Regional Citizens Advisory Council
Cook Inlet Regional Citizens Advisory Council

Section 8.3: Major Comments Received on the Amendments to the ACMP Listing

This section summarizes the written comments received on the statutory and regulatory amendments that constitute the ACMP amendment, and provides the state/OPMP response to those comments.

HB 191. On March 12, 2003, at the request of Governor Frank Murkowski, House Bill (HB) 191 (and companion Senate Bill 143) was introduced to the Alaska State Legislature on March 12, 2003. This bill was referred to the House Fisheries Special Committee, Resources, Judiciary, and Finance Committees, and the Senate Resources and Finance Committees. Each of these legislative committees scheduled hearings on the bill where amendments were offered, discussed, and passed and public testimony was taken for consideration.

HB 191 was introduced to reform and streamline the Alaska Coastal Management Program (ACMP). The goal of this legislation was to create a new coastal management program that retained the benefits of the federal CZMA but eliminated the duplication and complexity built into the present ACMP. This bill would achieve this goal by choosing the simplest of the three management techniques allowed by the federal act. The bill provided certainty and predictability to the ACMP process by clarifying the standards and responsibilities for program implementation.

The central streamlining concept of the bill was the reliance on existing state statutes and regulations as the enforceable policies of the ACMP. The current duplicative consistency review process in AS 46.40.096 and 6 AAC 50 would be eliminated by simply relying on the issuance of current state permits by the resource agencies as the means of determining whether an activity is consistent with the ACMP.

The bill would eliminate district coastal management enforceable policies but retain a local role in three ways. First, AS 29 municipalities would retain their existing land use authorities to regulate private activity within their jurisdiction. Second, the bill would authorize the Department of Natural Resources (DNR), as the implementing agency, to adopt local ordinances as enforceable policies to be applied in consistency reviews of federal projects and Outer Continental Shelf (OCS) development. The DNR would consult with the local government when interpreting and applying the local ordinance as part of a consistency review. Third, the bill would specifically adopt certain existing coastal district policies for federal OCS development as state enforceable policies.

Coastal resource service areas in the unorganized borough would no longer exist. However, municipalities within the unorganized borough could participate in both the funding and regulatory aspects of the program.

The bill would also eliminate the Coastal Policy Council, but would create a Coastal Program Evaluation Council to submit a report to the Governor on the implementation of these reforms. The council would sunset July 1, 2005.

In response to the introduction of the proposed legislation, several legislative committee hearings were held in the House between March 12, 2003 and May 21, 2003. The hearings were open to the public and resulted in a number of changes to the original bill.

During the House committee process, HB 191 was significantly amended to respond to testimony brought by local governments, coastal districts, industry representatives, and the general public. HB 191 as introduced was intended to retain for the state the benefits of the federal Coastal Zone Management Act, but eliminate the duplication and complexity built into the Alaska Coastal Management Program.

The Committee Substitute (CS) returned to the basic structure of the existing ACMP. It retained the four existing Coastal Resource Service Areas located in the unorganized boroughs and all of the existing coastal districts. The CS also retained the local enforceable policies and the statewide standards of the program. It also ensured that the federal activities, activities requiring a federal permit, or an activity requiring a state permit occurred within the coastal zone will have a consistency review. The CS ensured that the districts would retain their "seat at the table" as project decisions are made.

The CS made significant changes to the program, attempting to retain the important elements, while addressing the problems previously identified. The CS eliminated the Coastal Policy Council and transferred its duties to the Commissioner of the Department of Natural Resources. It also placed a sunset provision on the current statewide standards and current coastal district plans, and mandated that they be replaced within the next three years with standards that are clear, concise, and not duplicative of otherwise existing requirements. The CS also clarified that local enforceable policies found in district plans may not address a matter that is regulated or authorized by state, or federal law, unless the policy relates specifically to a matter of local concern.

The legislation provided important improvements to the consistency review process in order to ensure more predictable timelines. These improvements included, clarifying the scope of the project that is subject to review, and when a project can proceed in phases. It also encouraged expanding the use of general authorizations. The CS clarified that DEC permits and authorization will constitute the consistency determination for activities regulated by DEC's statutes and regulations and insulated the ACMP consistency review process from delays associated with these permits and authorizations.

The Senate introduced companion legislation, SB 143, and held hearings on March 26, 2003; April 23, 2003; April 25, 2003; and April 28, 2003. As a result of the additional testimony from the Senate hearings, the House made five amendments to CSHB 191(RES). The amendments included the following five changes.

1. The House adopted an amendment restoring the language in the existing statute at AS 46.40.096(d) that the reviewing entity request comments from "interested" as opposed to "affected" person. The restoration of the "interested" language was made to avoid arguments that the section would not provide for the public notice required by federal law.

2. The second change was a clarifying amendment made by the House concerning the process used when only DEC permits are required for a project in the coastal zone. See AS 46.40.096(j). The amendment removed the references to AS 46.40.96(g) and AS 46.40.040(b) in the consistency review "trigger" provision of .096(j).

   The change clarified that under .096(g) DEC will exclude from the .096 review the activities subject to DEC permits, but DEC will evaluate the project under .096(k) to determine if there are any other activities that are the subject of a local district enforceable policy. If so, those other activities will be evaluated for consistency against the local policies and the statewide standards.

3. An amendment made in House Finance addressed exceptions to the 90-day consistency review deadline. This amendment provided that the 90-day deadline is suspended in three circumstances. The first is when an applicant has not adequately responded within 14 days of receipt of a request for additional information. The second is when the applicant requests that the review time be suspended. The third is when a draft consistency determination undergoes an administrative appeal within the department known as an elevation.

4. The fourth change was made on the House Floor concerning the transition provisions. The changes provide that the ACMP regulations at 6 AAC 80 and 6 AAC 85, and the district programs remain in effect until they are amended through a DNR public process or they sunset under the bill's transition provisions.

5. The last change was new language added in House Finance to the transition provision. The new subsection provided that "upon request, the Department of Natural Resources shall consult with coastal districts to identify plan amendments that will meet the standards and guidelines established under this Act."

As a result of the public participation in the legislative process by local governments, coastal districts, industry representatives, and the general public, HB 191 as originally introduced, was significantly altered. The Legislature responded to the public comments generated during the hearings held between March 12, 2003 and May 21, 2003 and forwarded HB 191 in its final form for adoption and signing on May 21, 2003.

HB 69. The primary focus of this legislation was to develop a framework for addressing shallow natural gas development. Public comments identified the permitting structure in Alaska as designed for deep, high-pressure oil and gas operations rather than for shallow, low-pressure natural gas resources. The existing regulations are based on the larger, more traditional deep hole drilling operations and prevent timely and efficient exploration and development when applied to shallow gas. Comments from interested parties identified appropriately timed, upfront private landowner notification and a request to remove proposed limits on a municipality's Title 29 authority to apply local zoning ordinances to shallow natural gas production wells.

The resulting legislation addressed consistency determinations and included a provision that shallow gas exploration and development projects are "consistent" when conducted under the oversight and regulation of the Alaska Oil and Gas Conservation Commission and state resource agencies.

HB 86. This legislation sought to reduce third-party lawsuits particularly after permitting processes have been completed. Comments received throughout the hearings in both the state House and Senate strove to balance the right of the public to challenge its government with the goal of reducing frivolous and costly post permitting lawsuits. Industry representatives discussed recurring litigation impacts while others were concerned about protecting the public process.

This legislation specifies that the applicant or an affected coastal resource district may appeal a non-constitutional matter; otherwise the consistency determination is not subject to review, stay or injunction by the courts.

11 AAC 110, 11 AAC 112, and 11 AAC 114. As mandated in HB 191, DNR revised the regulations at 6 AAC 50, 6 AAC 80, and 6 AAC 85. A result of moving DGC out of the Office of the Governor and into DNR was the corresponding change in the numbering of the Alaska Administrative Code for the ACMP regulations. New chapters under DNR's AAC were prepared (11 AAC 110, 11 AAC 112, and 11 AAC 114) which replaced the regulations in effect under the Governor's Office AAC (6 AAC 50, 6 AAC 80, and 6 AAC 85).

The development of the regulations provided ACMP participants with three formal opportunities for providing written comments on the regulations.

The first comment period was for the entirety of the proposed regulations at 11 AAC 110, 11 AAC 112, and 11 AAC 114, and provided draft regulations dealing with the implementation of the Alaska Coastal Management Program (ACMP), the coastal standards of the ACMP, and the district coastal management plan criteria, including the following:

- As a result of the transfer of ACMP responsibilities from the Coastal Policy Council and the Division of Governmental Coordination to DNR by Executive Order 106 and Chapter 24 SLA 2003, DNR is proposing to adopt ACMP regulations in Title 11.
- New chapter 11 AAC 110 will clarify and make specific all aspects of consistency review of a project with the ACMP, and the general implementation of the ACMP.
- New chapter 11 AAC 112 will clarify and make specific the application and implementation of the statewide coastal standards, and the general implementation of the ACMP.
- New chapter 11 AAC 114 will clarify and make specific all aspects of district coastal management plan criteria and the review and approval process for district coastal management plans.

The review and comment period for this set of regulations began on February 20, 2004 and ended on April 2, 2004. Thirty-nine groups, individuals, and agencies submitted comments to DNR regarding the proposed regulations. A summary of those comments, titled Response to Public Comments, February 20, 2004, Public Notice Draft of Proposed ACMP Regulations and dated May 3, 2004, is included with this response.

A second, focused set of regulations providing for additional changes to 11 AAC 112.020 were released for public review on comment on March 24, 2004. Comments were accepted through April 23, 2004. This set of regulations provided for an applicability provision for the statewide standards of the Alaska Coastal Management Program (ACMP) once approved by the U.S. Department of Commerce under the federal Coastal Zone Management Act. Though three coastal districts provided comments on the proposed regulations at 11 AAC 112.020, the comments were not substantive and the state did not respond to those individual comments.

A third set of regulations providing needed clarifications to the regulations were prepared for and released for public review and comment. These clarifications

were dealing with the standards of the Alaska Coastal Management Program (ACMP), and the district coastal management plan criteria, including the following:

- Changing certain provisions of 11 AAC 112 and 11 AAC 114 that address various subsistence uses, including 11 AAC 112.270(a) and (b), 11 AAC 112.300(b)(4)(B), 11 AAC 112.990, 11 AAC 114.010(c)(4), 11 AAC 114.230(b), 11 AAC 114.250(g), 11 AAC 114.410(b)(1), and 11 AAC 114.990, to define, clarify, and consistently use the terms "subsistence fishing" and "subsistence uses" as those terms are defined in AS 16.05.940.
- Repealing 11 AAC 112.270(c), which defines the term "avoid or minimize," and relocating the definition of that term at 11 AAC 112.990.
- Changing 11 AAC 112.300(b)(9), which addresses management of important habitat, to clarify that coastal district enforceable policies may define whether specific land or water uses or activities will be allowed within the designated important habitat area.
- Repealing and readopting 11 AAC 112.900, which addresses the sequencing process to avoid, minimize, or mitigate adverse impacts, to require that avoidance and minimization of impacts be applied to the maximum extent practicable, to clarify the definition and applicability of the term "mitigation," and to clarify the relationship between mitigation requirements imposed through a federal authorization required under 11 AAC 110.400 and those imposed under paragraph (a)(3).
- Changing 11 AAC 114.270(h), which addresses review and approval of district enforceable policies, to clarify that the criteria set out in the subsection are to be applied only to enforceable policies developed as a matter of local concern under AS 46.40.070(a)(2)(C).

The review period for this set of regulations began on August 9, 2004 and ended on September 8, 2004. Thirteen groups, individuals, and agencies submitted comments to DNR regarding the proposed regulations. In addition to specific text or language suggestions, the following is a list of the general nature of the comments that were received:

- Many of the coastal districts that submitted comments addressed their frustration with the continued broad, sweeping changes to the ACMP, and the manner in which the changes were proposed.
- Many commentors generally addressed the removal of the term "compensatory" from the regulations, that a coordinating agency may

not require "no net loss" of impacted coastal resources, and that the revisions created two schemes of management for important habitats.

- Commentors also discussed the structural and substantive changes to the sequencing process for the avoid, minimize, and mitigate standard.

The comments provided several very important suggestions and clarifications that DNR embraced. The final regulations reflect those appropriate suggestions and clarifications that were offered by the commentors.

The state did not prepare a formal response document addressing the general nature of the comments received on this limited package of regulations. This was due, in part, on the timing of the regulations and their finalization, the need to incorporate those changes into the overall package of 11 AAC and the formal request for amendment to the ACMP as submitted to OCRM electronically on September 30, 2004, and officially received (hard copy) on October 4, 2004, and the deadlines that DNR is under for completing the revisions to the regulations by July 1, 2005. However, DNR did review and consider each comment that was submitted during the review and comment period, and has a record and response of its consideration.

A fourth set of regulations providing needed clarifications to the regulations were prepared for and released for public review and comment. These clarifications were identified by OCRM as necessary for preliminary approval, and were dealing with the ACMP implementation, statewide standards of the ACMP, and the district coastal management plan requirements, including the following:

- Adding a new section in 11 AAC 110 addressing the federal requirement to apply the enforceable policies of the ACMP to a project requiring a federal consistency certification or determination.
- Changing 11 AAC 112.270 to clarify that DNR or a coastal district can designate a subsistence use area, establishing the procedure and basis for DNR designation of a subsistence use area, and defining necessary terms used in the subsection.
- Changing 11 AAC 112.300(c)(1)(B)(ii) and 11 AAC 114.250(h)(2) to clarify one of the requirements for DNR or a coastal district to designate an important habitat area.

The review period for this set of regulations began on April 22, 2005 and ended on May 23, 2005. DNR reviewed and considered each of four comments submitted during the review and comment period, and has a record and response of its consideration. The comments provided important suggestions and clarifications that DNR incorporated into subsequent revisions.

SB 102 necessitated several technical and clerical edits to the regulations. Recognizing the extremely tight time constraints involved in the state submitting a timely amended amendment request to NOAA, the Alaska legislature included within SB 102 a declaration of emergency. This allowed DNR the authority to draft emergency regulations to ensure consistent and cogent implementation of SB 102, as amending HB 191. Thus, a fifth set of regulations providing these technical and clerical edits were adopted, filed, and became effective on June 1, 2005.

Section 8.4: ACMP Coordination With Local and Areawide Plans

Per 15 CFR 923.969(b)(2) Alaska is required to coordinate its program with local and areawide plans applicable to areas within the coastal zone. Coordination between the ACMP and local and areawide plans has been accomplished through the interagency and intergovernmental groups and processes created for implementation of the ACMP, as well as through the consistency review process of 11 AAC 110 and the coastal district plan development process of 11 AAC 114. Ongoing consultation and coordination between the ACMP and the local and areawide plans has been the forum for discussing and identifying any conflicts that may need to be resolved.

The following are the coastal districts that have plans, including areas meriting special attention or special area management plans, affecting the coastal zone as of January 1, 2004:

Aleutians East Borough
Aleutians West Coastal Resource Service Area
Bering Straits Coastal Resource Service Area
Bristol Bay Borough
Bristol Bay Coastal Resource Service Area
Ceñaliulriit Coastal Resource Service Area
City and Borough of Haines
City and Borough of Juneau
City and Borough of Sitka
City and Borough of Yakutat
City of Angoon
City of Bethel
City of Cordova
City of Craig
City of Hoonah
City of Hydaburg
City of Kake

City of Klawock
City of Nome
City of Pelican
City of St. Paul
City of Skagway
City of Thorne Bay
City of Valdez
City of Whittier
Kenai Peninsula Borough
Ketchikan Gateway Borough
Kodiak Island Borough
Lake and Peninsula Borough
Matanuska-Susitna Borough
Municipality of Anchorage
North Slope Borough
Northwest Arctic Borough

In accordance with HB 191, and as modified by SB 102, each of these coastal district plans, including the areas meriting special attention and special area management plans, are required to be revised to comply with the revisions to AS 46.40, 11 AAC 110, 11 AAC 112, and 11 AAC 114. The following is language from HB 191 (Section 47), as modified by SB 102 (Section 17), requiring these plans be revised:

> *(a) Within 20 months after the effective date of regulations adopted by the Department of Natural Resources implementing changes to AS 46.40.010 – 46.40.090, enacted by secs. 8 – 15 and 44, ch. 24, SLA 2003, or by March 1, 2006, whichever is later, coastal resource districts shall review their existing district coastal management program and submit to the Department of Natural Resources for review and approval a revised district coastal management plan meeting the requirements of AS 46.40 and the implementing regulations.*

Coastal district plans not submitted by the deadline or not meeting the requirements of AS 46.40 and the implementing regulations at 11 AAC 110, 11 AAC 112, and 11 AAC 114 will sunset on March 1, 2007, as provided for in HB 191 (Section 46), and as modified in SB 102 (Section 16).

Chapter 9: The National Interest and Energy Facilities

As discussed in Chapter 4, the ACMP concept of "uses of state concern" include:

> *(A) uses of national interest, including the use of resources for the siting of ports and major facilities that contribute to meeting national energy needs, construction and maintenance of navigational facilities and systems, resource development of federal land, and national defense and related security facilities that are dependent upon coastal locations;*
>
> *(B) uses of more than local concern, including those land and water uses that confer significant environmental, social, cultural, or economic benefits or burdens beyond a single coastal resource district;*
>
> *(C) the siting of major energy facilities, activities pursuant to a state or federal oil and gas lease, or large-scale industrial or commercial development activities that are dependent on a coastal location and that, because of their magnitude or the magnitude of their effect on the economy of the state or the surrounding area, are reasonably likely to present issues of more than local significance.*

The procedures described in the Chapters 3-6 will thus serve to assure continuing consideration of the national interest in facilities serving other than local needs in the development and implementation of coastal district plans.

In areas for which coastal district plans have not been developed nor approved by DNR, the state agencies managing the coastal land and water uses will also be required to consider adequately the national facilities of greater than local significance. AS 46.40.200 (in effect in 1977, repealed as of May 21, 2003) required that state departments, boards, and commissions "review their statutory authority, administrative regulations, and applicable procedures pertaining to land and water uses within the coastal area for the purpose of determining whether there are any deficiencies or inconsistencies which prohibit compliance with the program adopted. State agencies shall, within six months of the effective date of the Alaska coastal management program, take whatever action is necessary to facilitate full compliance with and implementation of the program…" Since that time, the ACMP has been implemented as a fully compliant program.

As described in the Chapters 4 and 6, 11 AAC 110.010(b) identifies those projects that are subject to the consistency review process of the ACMP. The orderly process for evaluating projects, including the siting of energy facilities, is the consistency review process described at 11 AAC 110. Activities of the project that are subject to the consistency review process of 11 AAC 110 must be found

consistent with the ACMP enforceable policies, including the Energy Facilities standard at 11 AAC 112.230.

A coastal district may also designate sites suitable for the development of major energy facilities in their district plan. 11 AAC 114.250(e).

The open nature of state proceedings under the Administrative Procedures Act at AS 44.62, the consistency review process of 11 AAC 110, and the district planning process at 11 AAC 114 assures that all persons and organizations wishing to present alleged national interests within the coastal zone for consideration will have the opportunity to do so.

In addition to the process for a coastal district to plan for and designate sites suitable for development described in Chapters 3 and 7, the process for considering the national interest in the planning for and siting of facilities is the consistency review process at 11 AAC 110. 11 AAC 110.010 sets forth the criteria for those proposed activities that are subject to the consistency review process of 11 AAC 110. If a project is subject to the consistency review process, 11 AAC 110.500 requires that the consistency review, including the opportunity to comment under 11 AAC 110.510, be publicly noticed. 11 AAC 110.510 provides the opportunity for any member of the public to submit comments on the consistency of the proposed activities, as well as any alleged national interest within the coastal zone that the coordinating agency should consider.

Chapter 10: The ACMP Changes

Section 10.1: Description of Need

The ACMP was enacted in 1977 with lofty goals of "balanced and sustained resource development," and "comprehensive land and water use planning in coastal areas." The problems leading to the enactment of the ACMA, as articulated in the 1979 FEIS, were manifold. While they comprise a lengthy list, their review is instructive to compare the vision of this program from its inception, to the point in the 1990s where the program began manifesting problems and required renovation:

1. Waterfront Space Scarcity. Despite Alaska's vast coastline, only limited area is available for commercial and industrial use. Much of the coastline is uninhabited, with no overland linkage to other areas. This, combined with adverse topographic and geologic hazard conditions, eliminates most of the approximately 44,500 miles of coast from consideration for ports, harbors and other shoreline development. Such developments also usually need to be near the markets and populations they intend to serve. This results in competition among users for the limited sites which meet the market, physical and transportation requirements of commerce and industry.
2. Energy Resource Development Impacts. Alaska is known to have substantial coal and petroleum resources, and has already had to contend with the negative impacts of their extraction. Additional fossil energy resources are expected to exist here along with other non-fossil energy resources, such as uranium. Enormous effort is needed to find and extract these resources in Alaska's often hostile environment, and impacts on that environment are bound to result. Impacts are frequently increased by the special measures needed for operations in Alaska. Projecting and coping with these impacts is an important public responsibility.
3. Maintaining the Fishery. While Alaska's fishing industry is regulated by state and federal authorities, problems remain of assuring continued protection of the habitat necessary to support this industry. This requires management of land and water areas, rather than of species. Except for special areas designated under state and federal laws, like critical habitat areas, land use management is beyond the scope of wildlife management agencies, and must be carried out by other agencies in coordination with wildlife management requirements.
4. Managing the Forest Resource. Several areas of the state have significant timber resources of commercial value. Harvesting this

resource and providing for the continuation of it is the focus of a comprehensive state program, but the broader impacts of silviculture on other coastal values are also of particular concern to Alaskans.

5. Transportation Needs and Impacts. Because of its size and character, Alaska has a considerable transportation problem. The lack of widespread transportation facilities has important consequences for other aspects of the state's economy. Provision of transportation is the goal of several state programs, but the possibly heavy impact of transportation facilities on other coastal values is a source of concern to many Alaskans. These problems also make resource management a difficult and expensive task.
6. Impacts of Mining. As with other coastal activities, mining has, and has had, adverse impacts on other coastal values. Yet, Alaska's economic future, and national energy needs, will require new and continued mining.
7. Impacts of Western Culture on Native Cultures. Alaska has been inhabited by Native cultures for thousands of years. These cultures have now been touched by western civilization. The Native cultures will continue to be affected, and will undoubtedly change as a result, but controlling that change and minimizing the adverse impacts that may result are important coastal issues.
8. Providing for the Alaska Subsistence Lifestyle. The subsistence lifestyle, or "living off the land," is a unique cultural aspect of Alaska. Practiced by Natives and non-Natives alike, subsistence competes with other uses of coastal resources. Protecting subsistence is one of the most important coastal issues.
9. Geological Hazards. Alaska has many coastal and inland areas with geologic conditions that may pose hazards to ill-planned development. The catastrophic 1964 earthquake is a recent example of unstable geologic conditions found in many parts of the state. With adequate knowledge and planning, development may still occur in hazard areas, but it is an important public responsibility to assure that such development is safe.
10. Changing Land Ownership Patterns. Native corporation land selections and conveyances, Statehood Act selections and conveyances, municipal entitlements, village selections and disposal of land to individuals all present a complex series of land ownership changes. When these changes are coupled with new management designations such as the recent invocation of the Antiquities Act, or other federal actions that may occur as a result of current deliberations in Congress over "national interest lands", major land and water

management challenges are presented to governmental and private landowners.

11. Bottomfish. With anticipated American participation in harvesting of Alaska's offshore bottom fisheries, and expected changes in harvesting and processing methods, Alaska can expect substantial growth onshore and the consequent need for community planning and preparation to support this new industry.
12. Governmental Regulation. As governmental attention to coastal concerns has increased, so have the number of regulations, permit systems, licenses and other requirements of state, local, and federal agencies. Major management and coordination challenges are present as a result, and a valid state coastal program must address and attempt to simplify these concerns as well.

The EIS concluded:

> These are the types of problems which ACMP is intended to address. In many cases, the solution to one coastal problem will have impacts on other coastal values. This, in itself, requires a program which looks at all of the coastal problems and involves all of the coastal interests, both governmental and private, in finding and implementing the solutions.

As the networked ACMP evolved, problems became increasingly apparent. The respective resource agencies simply were not "networking" effectively, projects were being mired in duplicative, over-burdensome regulatory processes, and various stakeholders felt disenfranchised. Government organizations began to question the very worth of a program that produced so many internal conflicts and development impediments.

As early as 1993, Senator Robin Taylor, Senate Majority leader, was prompted by "delays to all users" to ask Shelby Stastny, then-Director of the Office of Management and Budget, for a defense of the ACMP by providing a cost-benefit analysis of the program. Director Stastny's response, dated February 11, 1993, articulates eloquently why the ACMP is worth keeping, but perhaps promises more about the smooth operation of its networking than was being experienced in the consistency review trenches:

> As Alaska's population grows, and the state's economy expands, the competing uses and activities leads to conflicts – many of the controversies occur in coastal areas of the state. Coastal management is needed because it provides the only statewide working process which balances all the varied

> interests in resource development or resource protection and makes a single coordinated decision in a predictable timeframe.

Obviously, it was the perceived inaccuracy of this last assertion, that the ACMP "makes a single coordinated decision in a predictable timeframe" that had mobilized the ACMP's detractors. Director Stastny's reassurance regarding the efficient operation of the program set a very high bar:

> Coastal developers and other applicants benefit from Alaska's coastal management program. Simply put, they get: 1) help working their way through the State permit maze, 2) a one-stop, coordinated coastal review, 3) certainty on review deadlines, and 4) a single, State decision, rather than door-to-door permitting with the potential for conflicting requirements from different agencies.

Apparently, these "benefits" were not as readily apparent to applicants and the resource agencies as they may have been to Director Stastny.

Over the next few months and years, the CPC convened numerous sessions to address the program's shortcomings. The program was viewed as a networked process that was riddled with duplicative standards, perceived disenfranchisement of districts, state agencies resentful over districts relying upon state agencies for enforcement of district enforceable policies, conflicting agency/district interpretations of standards and timeframes, and unpredictable timetables and results for project applicants, whose investment dollars spent to responsibly develop Alaskan resources were beginning to look better spent in other states or resource-rich nations. Coastal districts were equally frustrated with the district planning process and how resulting in controversies over enforceable policies occurred at the last minute before CPC approval.

By late 1995, the CPC was faced with growing discontent from program administrators and stakeholders. On January 16, 1996, an ACMP Assessment dealing with the "Relationship of Program Authorities" was prepared in a DNR white paper. That white paper raised the "cornerstone issue" of "relationship of program authorities." For example, the DNR white paper noted,

> It is clear that DNR's appeal process and the ACMP appeal process overlap and provide two separate administrative processes to appeal the same issue on the same project. This overlap creates the possibility that the same issue could be appealed two or three times. The double appeal process is expensive, time consuming, confusing, and does not serve the public.

The white paper continued,

> There are two questions associated with this issue [of the "relationship of program authorities"]: 1) How do the ACMP authorities relate to the management and regulatory authorities of state agencies and local government? 2) Who has the responsibility for enforcement of the consistency determination?

Various options were considered, including the recommendation that "all ACMP regulations should be revisited in light of current practices."

A DEC white paper, dated February 2, 1996, echoed these concerns, focusing more narrowly on the difficult issues faced by DEC in having decisions made in their authorizations that constitute compliance with the ACMP standards on those issues, but still having DEC authorizations constitute a part of the ACMP. The problems raised here planted the seeds of the logical conclusion reached in HB 191: carve out DEC permits and authorizations from the ACMP consistency review process. The white paper outlined the problems:

> In developing the "air, land and water quality standard", 6 AAC 80.140, a decision was made to incorporate all of the statutes, regulations, and procedures of the Department of Environmental Conservation with respect to air, land and water quality… At the time, this was the most logical thing to do, given the intent of the ACMP standard to protect air, land, and water quality, and the fact that the regulatory authority for these purposes rested with DEC.
> …
> This standard has been problematic from a legal, procedural, and practical standpoint and continues to cause confusion in how it is interpreted, which regulations apply, and how it can be used by DEC, DGC, and coastal districts to implement the ACMP.… Having DEC's regulations included under both DEC and ACMP authorities has caused problems in the interpretation of those regulations, especially when the standard is carried in a local coastal district plan. As a most recent example, DEC recently approved oil spill contingency plans for the Prince William Sound Tankers. Coastal districts have petitioned the CPC that DEC did not correctly interpret the broad district policies incorporating DEC's regulations, and are insisting upon a very specific interpretation.
> …
> Conflicts have also occurred where other coordinating agencies disagree with DEC on conditions necessary to protect water quality. For example, USFS timber sales rely on the Forest Practices Act and Regulations, which

> does not consider water quality issues. Attempts by DEC staff to use 6 AAC 80.140 as a basis for carrying water quality related conditions have not typically been allowed by the coordinating agency.

As a result of these and other white papers, an ACMP Assessment Steering Committee was formed as a subcommittee of the CPC. On August 30, 1996, the Steering Committee issued its "Coastal Policy Council Report on the ACMP Assessment." The Assessment first set out the emerging conflicts that the EIS drafters had predicted:

> The array of birds and wildlife, the vastness of coastal forests, the productivity of fishery resources, the scenic grandeur, and the diversity of coastal communities and cultures along Alaska's coast is truly unique, a treasure in every regard.
>
> This treasure is also Alaska's key to economic development and community stability. Alaska's potential oil and gas reserves are among the largest in the world. Likewise, Alaska's wild salmon runs, that regularly produce a commercial harvest in excess of 100 million salmon, are the richest natural fishery in the world. Alaska is also a premier tourist destination, spurring new businesses throughout Alaska's coastal communities. Mining gold and silver is no longer a relic of Alaska's rich history. Project proponents seek to mine these and other minerals. Logging in the coastal spruce and hemlock forest stretches from Ketchikan to Kodiak. Equally important to all these economic activities is the traditional subsistence economy that defines hundreds of Natives villages located throughout Alaska's coast.
>
> Many of these diverse uses of coastal resources are conflicting. Opportunities to conserve sections of the coast for future subsistence, recreation, education and scientific study are without equal in the United States. Conversely, opportunities to develop the wealth of coastal resources such as oil and gas, mineral, fish and timber are also without equal. Striking a balance between conserving and developing these wild and rich coastal resources is the reason the Alaska Coastal Management Program came into being in 1977.

The Steering Committee then began outlining the problems, among which were the following:

> State agencies view the program as heavily influenced by local government without their having a commensurate level of responsibility for implementation and enforcement. Also, many agency personnel see the

> ACMP as duplicative and sometimes in conflict with other regulatory responsibilities. For them, the ACMP Assessment could lead to less duplication and more accountability by coastal districts for ACMP implementation.
>
> Some applicants see the ACMP as the primary mechanism for permit coordination, yet believe the process is complex and at times lengthy. Additionally, the coastal districts are seen as not particularly helpful to the industry. As such, the Assessment offers a means to promote more efficient reviews of projects and to develop more meaningful plans and policies.
>
> For persons with an ACMP history, several programmatic problems emerged over the years. To these people, the Assessment represents an opportunity to solve long-standing problems, such as improved coordination between local government responsibilities under Title 46 (Water, Air, Energy, Environmental Conservation) and under Title 29 (Local Government Powers).

While these white papers attempted administrative fixes for the problems they outlined, or endorsed redoubled efforts at coordination and cooperation, the problems were clearly more systemic than a lack good faith coordination effort on the part of program participants.

The program was struggling, to the point where, on January 3, 1997, Representatives Therriault and Kelly introduced HB 28 in the 20th Legislature: "An Act repealing the Alaska Coastal Management Program and the Alaska Coastal Policy Council, and making conforming amendments because of those repeals." Fortunately for the ACMP, this bill was not enacted by the legislature.

Recognizing the importance of salvaging the ACMP, the Knowles Administration reacted quickly in April 1997. By request of the governor, the Senate Rule Committee introduced SB 186 in attempt to fix the ACMP's procedural and administrative shortcomings. The bill related to:

> coordination of the application, review, decision, and appeal process for certain project permits; relating to the Alaska Coastal Policy Council and the Alaska Coastal Management Program; relocating certain functions of the office of management and budget to a statutorily created division of project assistance in the Office of the Governor.

In the governor's transmittal letter, dated April 24, 1997, the beginning of which is presented below, the governor summarized the pressing need for ACMP reform:

> Dear President Miller:
>
> Government must work to eliminate unnecessary obstacles to development while allowing opportunities for Alaskans to have an influence on projects that affect them and their communities. I am introducing this legislation to improve the efficiency of obtaining permits for economic development while maintaining protections of the environment and making public participation more convenient and meaningful.
>
> Doing resource development right requires decisions be based on sound science, prudent management and an open, responsive public process. A healthy environment is not possible without a strong economy, nor are good jobs possible without strong environmental protections.
>
> This initiative acknowledges that permitting has evolved in a piecemeal fashion over time and that efficiencies can be gained if requirements are consolidated. Under current law, permits for a single project require separate applications, most of which require redundant information. Each agency reviews the applications separately according to their individual timetables and requirements. Public notice and hearings on the applications may be conducted separately, under different standards for each permit, resulting in a duplication of time and expense for all. Several permits for one project may be appealed to separate agencies and to the Coastal Policy Council, even though each of the appeals is based on a common set of facts.
>
> Current procedures increase time and costs to the applicant, the public and state agencies without increasing environmental protection. This bill unifies permit procedures by project. As a result, Alaska will become a friendlier place for businesses to operate while making the public process more convenient and meaningful.

However, political differences prevented this bill from being passed by the legislature.

In 1997, the Alaska Legislature did pass a bill requiring reform of the coastal district plans. That bill, SB 308, included the following:

AS 46.40.030 is amended by adding a new subsection to read: (b) In developing statements of policies and regulations under (a) of this section, a coastal resource district may not incorporate by reference statutes and administrative regulations adopted by state agencies.

AS 46.40.094 is amended by adding a new subsection to read: (d) Notwithstanding any other provision of this section, for a natural gas pipeline project from the Alaska North Slope following a route that parallels the Trans Alaska Pipeline System and the Alaska Highway to the Canadian border or a route that runs south to Alaska tidewater, any agency responsible for the consistency determination with respect to proposed uses or activities involved in the project may, in its discretion, conduct the review and make the consistency determination in separate phases in a manner that promotes review of proposed uses and activities based upon the project's design, construction sequence, and schedule.

The uncodified law of the State of Alaska is amended by adding a new section to read: Modification of Approved Coastal Management Programs Plans (a) In a municipality or coastal resource service area for which the Alaska Coastal Policy Council has approved a district coastal management program that is not consistent with the prohibition of AS 46.40.030(b), added by sec. 1 of this Act, the municipality or coastal resource service area shall submit to the Alaska Coastal Policy Council, within one year after the effective date of this Act, program modifications to conform the program to the requirements of AS 46.40.030(b), added by sec. 1 of this Act.

(b) If a municipality or coastal resource service area does not comply with (a) of this section, the Alaska Coastal Policy Council may enter an order deleting the incorporation by reference of statutes and administrative regulations in violation of AS 46.40.030(b), added by sec. 1 of this Act.

Even in light of this new program requirement, there were no coastal districts that stepped forward to amend their coastal plans in accordance with the law. To further exacerbate the problem, the CPC also failed to enforce the new rules.

The problems and frustrations persisted, until the present governor took office on December 5, 2002. The new administration's transition team minutes included an array of possibilities from repealing the ACMP, or instituting "reform for a truly networked system that works in concert with the timelines and authorities of DNR, DEC, and DF&G." At a town meeting held on November 23, 2002, the governor solicited public input on what could be done to encourage oil and gas exploration. Some of the suggestions were:

- "Get rid of the ACMP"

- "Restructure and possibly rescind CZM authority"
- "Streamlining State permitting processes via comprehensive amendments to current statutory and regulatory requirement, and making those requirements 'fit for purpose'"

The Administration realized the value of the ACMP, and fended off efforts to repeal it. But clearly, the time had come to revise it. This led to Executive Order 106, introduced on February 12, 2003, which, as previously discussed, transferred responsibility for the ACMP from DGC to DNR.

EO 106 also called for reform legislation, namely HB 191, the contents of which have already been exhaustively described in the amendment. However, in his transmittal letter dated March 11, 2003, Governor Murkowski succinctly summarized its role:

> The Alaska Coastal Management Program was first enacted in 1977 in order to participate in the federal Coastal Zone Management Act of 1972. The federal program is voluntary, and encourages states to adopt coastal programs by providing federal funds and the opportunity for federal consistency review. Federal consistency review enables the state to apply its authorities to projects located on federal land and the federal outer continental shelf where otherwise it would be preempted by federal law.
>
> The goal of this legislation is to create a new coastal management program that retains the benefit of the federal act but eliminates the duplication and complexity built into the present ACMP.
> …
> Because the bill would affect the way coastal communities participate in the program, I have consulted with communities across the state and incorporated their suggestions into the legislation.

Relevant to this Statement of Need, committee notes on the bill capture the testimony describing the problems and the proposed fixes to the program, particularly regarding the DEC carveout. Provided below are notes from testimony offered May 3, 2003, by consultant Marty Rutherford and former DGC Director, Patrick Galvin:

Ms. Rutherford: She reported that the coastal management program is an older program that has not adequately responded to the changes in the Alaska statutory and regulatory regime. The result is that existing programs are often redundant. It is a program that uses local enforcement policies that are often a reiteration of the regulatory agencies permitting standards. Furthermore, the

program's consistency review process as currently structured is unpredictable and overly broad in scope and takes too much time.

Ms. Rutherford continued, the statewide standards and the local enforcement policies are often vague and subject to multiple interpretations. She noted that the program does have problems, however, the sweeping changes proposed in the original HB 191 does eliminate many of the fundamental reasons that Alaska embraced the coastal management program in the first place.

Pat Galvin: The language in Section 11 refers to the standards of the program. The Coastal Management Program (CMP) has always looked to the Department of Environmental Conservation statutes and regulations as establishing the air, land and water quality standards for the program and for the most part, the districts have referred to those standards. The bill is a product of a problem that has existed within the Coastal Management Program based upon the embedding of the Department of Environmental Conservation standards into the Coastal Management consistency requirements. For the permitting process, a project could not be found consistent until it was found by the Department of Environmental Conservation to meet all their requirements, resulting in no permits being issued because the State cannot issue permits until the Department finds the projects consistent. The intent of the legislation is to separate those two so that the Department of Environmental Conservation permitting process can proceed at its own pace and the consistency determination can be issued without waiting for the Department to complete the permit.

Ms. Rutherford: The Coastal Management Program has been rifled with litigation for the past 15 years. The intent of the legislation is to bring some clarity into the statewide standards and local enforcement policies so that they are not subject to the confusion that currently exists.

The Legislature agreed that reform was needed:

REPRESENTATIVE MASEK: remarked that curtailing development in Alaska's coastal zone is not a reasonable option in these difficult economic times; if the need to protect the coast isn't recognized, however, there is a risk of damage that affects the standard of living and livelihood of Alaska's coastal residents. She highlighted the ongoing challenge of managing use of the coast so that undesirable impacts are minimized and growth and development are enabled. Regarding the unorganized borough, she said she believes the state is obligated to manage the coastal areas to ensure protection from harm in addition to development for the future. She emphasized the need for a shared purpose and cooperation among

government, industry, and the community in order to ensure sustainable development and management of Alaska's coastal zones. She offered her belief that this legislation can promote that cooperation, and said she feels pretty comfortable moving the bill from committee.

REPRESENTATIVE HEINZE: referred to the saying, "If it ain't broke, don't fix it." She opined that this has been broken for years, and suggested [the current version] is something to be proud of.

REPRESENTATIVE WOLF: said his hat is off to the administration.

DNR Commissioner Tom Irwin summarized the need for the legislation, and how the components of the bill would best serve the interests of the state as a whole:

TOM IRWIN: Commissioner, Department of Natural Resources (DNR), told the committee that the Murkowski Administration has a vision for governing Alaska. [That vision] is driven by the reality of the budget and a recognition that in the current world economy, Alaska must compete for capital investment. He continued as follows:

Ours is a world where industry analyzes the time it will take to get through a permitting process, because this time is real money. This affects the large oil and mining companies and, frankly, where time is money, it affects the smaller companies, and it really can affect the "mom and pop" applicants who have an idea for a business and are attempting to work their way through a very complex and uncertain regulatory process, regulatory system.

Therefore, we have a basic goal to streamline and consolidate our permitting functions, and this will provide applicants a faster and more certain review. By a certain review, I mean that the standards of a review will be clear and concise, and not subject to various interpretation of the language in a vague standard.

We are attempting to do this by three things: One, establish a project coordination office; two, identifying various regulatory functions that might be improved by clarified standards and processes; and three, by changing the coastal management program's consistency review process.

Currently, the ACMP [Alaska Coastal Management Plan] consistency review process is very redundant, using local enforceable policies and state

standards that are often a reiteration of the regulatory agency's permit standards.

This summarizes why the ACMP reform was called for, and why it occurred when it did. The statutory revisions at AS 46.39 and AS 46.40, and the implementing regulations at Title 11 of the Alaska Administrative code, address the concern and frustration that built for many years over the inefficient operation of the program and its concomitant disincentive to development, potentially harming Alaska's economy irreparably. The drafters of the ACMP program wrote with considerable prescience in 1979, noting repeatedly that economic development of Alaska's coastal areas was not only inevitable, but a trend that would increase over time, making the competing uses and interests even more contentious. The need for clarity, predictability and flexibility were deemed critical elements of the program, to accommodate the inevitably changing legal and socio-economic landscape. EO 106, HB 191, and Title 11 of the Alaska Administrative Code have accomplished those goals in the most even-handed manner possible.

Section 10.2: Statutory Revisions to the ACMP

On November 27, 2002, the Office of Ocean and Coastal Resource Management (OCRM) approved as a routine program change perhaps the most sweeping change to the ACMP since its approval in 1979, namely the regulatory amendments to 6 AAC 50, which at that time provided necessary clarification to the consistency review process. Those revisions amended:

- Clarified that the applicability of a consistency review process is based upon a "trigger" (a federal activity or a federal or state authorization), as well as the location of the project (within the coastal zone or outside the coastal zone but subject to review under 15 CFR § 930) (6 AAC 50.005);
- Described the process and participants that are involved in determining scope, and provided predictability in the scoping process. The amendments provided this predictability by defining the required content of the applicant review packet (6 AAC 50.220, .325, and .425), identifying the packet completeness and consistency review deadlines (6 AAC 50.225, .235, .240, .335, and .435), clarifying the request for additional information sections (6 AAC 50.245, .345, and .445), and justifying the reasons for modifying or stopping the review (6 AAC 50.280 and .800);
- Clarified the review participant requirements [6 AAC 50.070(h), .100(a), .255, .365, and .465];

- Required the applicant to adopt any proposed alternative measures, or otherwise modify the project to achieve consistency, in order to match the federal consistency requirements [6 AAC 50.260(h) and .445(d)];
- Provided evaluation and consistency review process for a project that is proposing a modification after a final consistency determination has been issued (6 AAC 50.810 and .820);
- Eliminated the project-specific petition process, clarifying process and requirements for a petition on district program implementation;
- Identified and implemented the "ABC List." Then-current regulation provided for expedited reviews under 6 AAC 50.50.050. Though the "ABC Lists" [categorically consistent determinations (the "A" List), general consistency determinations (the "B" List), the list of state authorizations that would trigger or be subject to the consistency review process (the "C" List), and the listing of general and nationwide permits] had existed and been implemented for years, there had been no regulatory guidance for their management or implementation. The regulatory amendments at 6AAC 50.710 – 6 AAC 50.750 provided the process for developing and amending the lists or items on the lists, and how the lists and items on the lists are to be implemented and managed. At section 6 AAC 50.750, the regulatory amendments codified and adopted by reference the state authorizations subject to the consistency review process of the ACMP, which thereby subject to the consistency review process of the ACMP. These regulatory amendments did not change the land or water uses subject to the consistency review process, but did incorporate necessary amendments to the specific statutory and regulatory cites. The amendments also clarified that the list adopted by reference (the "C" List) is an exhaustive list of state authorizations that trigger or are to be included in a consistency review of a project.

There were also several technical changes made to AS 46.40 in 2002. Subsection (b) of AS 46.40.030 (development of district coastal management programs) was added to prohibit the adoption by reference of state statutes and regulations by coastal districts. Subsection (c) of AS 46.40.094 (consistency determinations for phased uses and activities) was added to allow permitting agencies to make consistency determinations in separate phases for a North Slope natural gas pipeline project paralleling the Trans Alaska Pipeline System and the Alaska Highway or a route that runs to Alaska tidewaters (am § 2 ch 28 SLA 2002). AS 46.40.096(h) was added, whereby if an activity was authorized under a general or nationwide permit that had been previously reviewed and determined consistent with the ACMP, it does not have to be put back through a review (retroactive to August 1, 1998) (am §§ 1, 9 ch 29 SLA 2002). Subsection (b) was added to AS

46.40.100 (compliance and enforcement) to permit a coastal resource district, a citizen of the coastal resource district, or a state resource agency to file a petition showing that a district coastal management program was not being implemented (am § 2-7 ch 29 SLA 2002). All of these statutory changes were submitted to and approved by OCRM as routine program changes to the ACMP.

However, for several decades leading up to the changes made in 2002, problems had emerged regarding the efficiency and efficacy of the ACMP. These problems are detailed in Section 10.1 of this chapter. In essence, the consistency review process was unpredictable, was overly broad in scope, took too much time, and delayed the issuance of permits. The statewide standards and local enforceable policies were vague, subject to multiple interpretations, and often duplicated or restated other state or federal requirements. Unpredictable timelines and standards deprived applicants the certainty needed to make capital commitments on future projects.

To begin correcting these long-standing problems, Governor Murkowski introduced Executive Order 106 on February 12, 2003, which transferred responsibility for the ACMP from the Division of Governmental Coordination (DGC) to the Department of Natural Resources (DNR). EO 106, which took effect on April 15, 2003, did not make substantive changes in the law, but repealed existing statutes in AS 44.19 and readopted them in a new title 46.39.

Premised on EO 106, on May 21, 2003, the Governor signed into law HB 191 (chapter 23 SLA 2003, various eff. dates). The bill recited "a need to update and reform the existing statewide standards of the ACMP so that they are clear and concise and provide needed predictability as to the applicability, scope, and timing of the consistency review process under the program." The bill also described "a need to update and reform the district coastal management plans under the ACMP so that the local enforceable policies within those plans are clear and concise, provide greater uniformity in coastal management throughout the state, relate to matters of local concern, and do not duplicate state and federal requirements."

On June 6, 2003, Governor Frank Murkowski signed into law SCS HB 69 (RES) (chapter 45 SLA 2003) which made additional amendments to the ACMP's statutes. The effective date of HB 69 was June 7, 2003. The statutory amendment sets forth the consistency review process for the exploration and development of shallow natural gas activities that are conducted under the oversight and regulation of the Alaska Oil and Gas Conservation Commission (AOGCC) and the state's resource agencies. The legislature determined that these shallow natural gas projects, as described in the bill and conducted under the oversight and regulation

of the AOGCC and state resource agencies, are de minimis in nature and pose significantly fewer risks and create substantially less impact to the environment than traditional deep oil and gas projects, and as such are consistent with the ACMP. This determination of consistency is similar in application and effect to categorically consistent determinations already included in the ACMP under Article 7 of 11 AAC. The application of this determination is applicable throughout Alaska's coastal zone, and is specifically applicable in those areas that have valuable and developable coal deposits that may yield natural gas.

On June 12, 2003, Governor Frank Murkowski signed into law SCS CSSS HB 86 (JUD) (EFD FLD S) (chapter 81 SLA 2003) which made further amendments to the ACMP's statutes. The effective date of HB 86 was September 10, 2003. The statutory amendment eliminates third-party lawsuits brought against an OPMP/ACMP final consistency determination. A brief description of the statutory amendments contained in HB 86 follows:

(A) Section 3 of the bill provides that only the applicant and a coastal resource district have standing to bring a non-constitutional judicial challenge to a consistency determination. The application of this provision is applicable to all proposed projects subject to the ACMP.

This limitation is similar to the one previously approved by OCRM in AS 46.40.096 that limits who can request administrative "elevations" during a consistency review to the applicant, resource agencies or a coastal resource district. It is important to note that the judicial appeal mechanisms for third parties was not a factor in OCRM's original approval of the ACMP and such a mechanism is not a requirement of program approval under the CZMA. Alaska's program will continue to be among the most generous of the nation's coastal zone programs in giving local people the ability to affect state decisions on projects located within the coastal zone, both through judicial review and other means. A number of federally-approved state programs, for example, provide for no judicial review at all, such as the Virginia program (Virginia Executive Order Thirteen (June 23, 1986)) and the Florida program (Florida Statutes Annotated §§ 380.20 et seq.).

(B) Section 4 is a direct authorization of permitted oil and gas projects in the Cook Inlet Basin. The section gives final state regulatory approval to every project that, as of September 10, 2003, has its resource agency permits and coastal zone consistency determination in hand. The section also provides that, with the exception of constitutional challenges, the prior agency approvals and the new

> Legislative approval "are not subject to judicial review, or, if pending, continued judicial review." The application of this provision is specific to the Cook Inlet Basin projects.
>
> This section does not amend the ACMP. First, the projects at issue had completed the required consistency determinations as provided by the approved program. Second, subsequent judicial review was not a factor in OCRM's original program approval nor a requirement of the CZMA.

On May 26, 2005, the Governor signed into law HCS CSSB 102(RES) which made additional amendments to the ACMP's statutes. The statutory amendments accomplish nine substantive objectives: (1) repeals the ACMP; (2) amends the language relating to certain district prohibitions when writing district enforceable policies; (3) extends by eight months the effective authority of existing district coastal management programs; (4) extends by eight months the deadline for coastal resource districts to submit to DNR revised district plans; (5) repeals district enforceable policies that are in conflict with state law; (6) mandates DNR review and update the ABC List; (7) declares as an emergency the DNR's need to adopt implementing regulations; (8) amends the annulment date of the existing state standards and district coastal management plan requirements; and (9) establishes an immediate effective date.

These four bills completed the statutory amendments needed to adequately reform the ACMP. Because HB 191 contains the vast majority of the changes to the ACMP, a full sectional analysis is provided below. The essential components of HB 191 were: to eliminate the CPC and transfer its authority for the development of statewide standards of the ACMP and the approval of district coastal management plans to DNR; to require that DNR adopt regulations by July 1, 2004 establishing clear and enforceable statewide standards of the ACMP and criteria for the approval of new district coastal management plans; to retain coastal resource districts and the structure of how they operate under the ACMP, but require coastal resource districts to revise their coastal district plans; require coastal resource districts to submit new coastal management plans to DNR for approval, which plans must have enforceable policies that are clear, concise, provide greater uniformity throughout the state and do not duplicate state and federal requirements; to require the districts to submit these new plans within one year of the effective date of DNR's new regulations, or July 1, 2005, whichever is later; to streamline the ACMP by relying on the requirements of the Department of Environmental Conservation (DEC) at AS 46.03, AS 46.04, AS 46.09, AS 14 and their implementing regulations as the enforceable policies of the ACMP for those purposes and relying on DEC's implementation of those requirements in order to determine consistency for those

parts of a development project; and clarify when a consistency review is required under the ACMP, the scope of the activities subject to the review, and the standards against which the project will be measured.

Subsection 10.2.1: Sectional Analysis of HB 191

- Section 11 of the bill established the Department of Environmental Conservation's Statutes at AS 46.03, AS 46.04, AS 46.09, AS 46.14, and the regulations adopted thereunder, as the exclusive policies of the ACMP for those purposes. The scope of DEC's exclusive regulatory role within the ACMP is to be determined by looking to the specific statutes and regulations to determine the subject matter and activities regulated by those authorities.
- Section 11 of the bill streamlined the ACMP by removing the duplication of DEC's permitting review process in a consistency review under AS 46.40.096. Section 11 provided that the issuance of permits and the other authorizations by DEC constitute a determination of consistency with the ACMP for the purposes of those environmental standards for those activities of a proposed project subject to those permits and other authorizations. In the case of activities that would not require a DEC permit because the activity is located on federal lands or the federal outer continental shelf, consistency with these DEC requirements are to be determined by whether the requirements for those permits and authorizations were met, even though the issuance of a state permit is not legally required. AS 46.40.040(b)(2). Section 11 conforms with the existing air, land and water quality statewide standards of the ACMP at 6 AAC 80.140 and the federal Coastal Zone Management Act's requirement that these environmental standards be included in the state's coastal program.
- Amendments adopted in the House to secs. 11 and 22 of the bill, make clear that coastal resource districts could have enforceable policies for activities of a project that are not addressed by the DEC standards set out in sec. 11. District enforceable policies in these other regulatory areas are allowed if they meet the test set out in sec. 14 of the bill. However, under sec. 11 of the bill, a district enforceable policy may not set a more stringent standard than one set by DEC under the requirements set out in sec. 11.
- Sections 12-14 of the bill made important changes concerning the review and approval of district coastal management plans. Section 12 added a new requirement to AS 46.40.060 that a coastal resource

district must review and resubmit its plan for approval every ten years.

- Section 13 amended the district plan review and approval provision at AS 46.40.060. It provides that the DNR may approve a district coastal management plan provided it meets the requirements of AS 46.40, the statewide standards adopted by DNR, and the district plan criteria adopted by the department. As under existing law, a district plan may not arbitrarily or unreasonably restrict or exclude uses of state concern. Uses of state concern are defined in AS 46.40.210(8) at sec. 42 of the bill.
- Section 14 established specific requirements for department review and approval of district coastal management plans in AS 46.40.070. The DNR may approve a district plan under AS 46.40.060, if it meets the requirements of AS 46.40, AS 46.40.060 and the enforceable policies of the plan meet the requirements of AS 46.40.070(a)(2). AS 46.40.070(a)(2) requires that the enforceable policies be clear and concise, and use precise, prescriptive, and enforceable language. In addition, the enforceable policy may not address a matter regulated or authorized by state or federal law unless the enforceable policies relate specifically to a matter of local concern. "Matter of local concern" is specifically defined in the bill as "a specific coastal use or resource within a defined portion of the district's coastal zone, that is (i) demonstrated as sensitive to development; (ii) not adequately addressed by state or federal law; and (iii) of unique concern to the coastal resource district as demonstrated by local usage or scientific evidence.
- Section 16 of the bill amended existing AS 46.40.094 that describes how a project may be reviewed for consistency with the ACMP in "phases." This amendment broadened the phasing statute to allow projects other than traditional oil and gas leasing projects to be reviewed in phases. The phasing test is changed from whether future information is "obtained in the course of a phase" to whether the information "was not available to the project applicant at the time of the previous phase." This change makes the language consistent with the federal coastal management regulations allowing for phasing of federal activities subject to a consistency review in 15 C.F.R. 930.36(d).
- Sections 17-22 of the bill amended the existing statute providing for consistency reviews of development projects in the coastal zone. Section 18 clarified that state consistency reviews are triggered by state resource agency authorizations. Section 21 amends AS 46.40.096(g) to exclude certain activities and permits from the

consistency review process in AS 46.40.096. An activity that is authorized under general or nationwide permits previously determined to be consistent with the ACMP is not required to be reviewed a second time. As provided in sec. 11, DEC's review of an activity under AS 46.03, AS 46.04, AS 46.09, AS 46.14 and its implementing regulations is not included in the consistency review process in AS 46.40.096. Activities excluded from a consistency review under the provisions of the Forest Practices Act (AS 41.17) are excluded from a consistency review under AS 46.40.096.

- Section 22 of the bill added new subsections at AS 46.40.096 to clarify what permits or activities trigger a consistency review, the scope of the review once triggered and the geographic scope of the activities subject to a review.
- New subsection AS 46.40.096(j) describes the trigger for a consistency review as an activity within the geographical areas described in (*l*) that is subject to a state resource agency permit, lease, authorization, approval or certification. The exceptions to this trigger are the federal consistency review and certifications under federal law that are triggered as provided for in 16 U.S.C. 1456 and 15 C.F.R. Part 930. See AS 46.39.010(a) (DNR "shall render, on behalf of the state, all federal consistency determinations and certifications authorized by 16 U.S.C. 1456"). The other exception to the AS 46.40.096(j) trigger is the exception to the consistency review requirements contained in the Forest Practices Act (AS 41.17). A project that includes an activity subject to a DEC permit triggers a consistency review under AS 46.40.096(j). However, activities subject to the DEC permits are excluded from the scope of the review as provided in AS 46.40.096(k) and AS 46.40.040(b). The other activities of a project undergoing a DEC single agency consistency review or a DNR lead consistency review are reviewed against the enforceable policies described in AS 46.40.210.
- New subsection AS 46.40.096(k) provides that except as provided in the phasing statute (AS 46.40.094) and the Forest Practices Act (AS 41.17), AS 46.40.040(b) and AS 46.40.096(g), the scope of a consistency review is limited to activities subject to the permit or authorization and a coastal resource district policy approved by DNR.
- New subsection AS 46.40.096(*l*) defines the geographic area where an activity triggers a consistency review and the geographic scope of the review once triggered. The consistency review process applies to activities within the coastal zone of the state (defined in AS 46.40.210), and to activities on the federal outer continental shelf or

on federal land that are within the geographical boundaries of the state's coastal zone.[10]

- New subsection AS 46.40.096(m) added the requirement that DNR establish in regulation the state resource agency permits and federal permits that trigger a consistency review. The subsection also directs DNR to establish by regulation categories and descriptions of uses and activities that are determined to be consistent with the ACMP or that would be made consistent with the inclusion of standard alternative measures. The existing list of such activities is known as the "ABC" list. The new legislation directs that these categories and descriptions of uses and activities be reviewed by DNR and made as broad as possible so as to minimize the number of projects that must undergo an individualized consistency review.
- New subsections AS 46.40.096(n) and (o) establish a new 90-day deadline for completing consistency reviews. New AS 46.40.096(p) expressly states that a consistency review under AS 46.40.096 need not be held up by a DEC or other permit excluded under AS 46.40.096(g).
- Section 38 of the bill is a new savings clause clarifying that nothing in AS 46.40 diminishes state jurisdiction or affects state requirements as they apply to the federal government under a federal authorization or federal waiver of sovereign immunity. The savings clause also makes clear that the coastal zone act does not diminish the zoning or planning authority of municipalities under AS 29.
- Section 45 was amended by SB 102, and is discussed in that sectional anlysis.
- Section 47 was amended by SB 102, and is discussed in that sectional anlysis.
- Section 49 was amended by SB 102, and is discussed in that sectional anlysis.

Subsection 10.2.2: Implementation of HB 191

Prior to passage of SB 102, HB 191 established the following deadlines:

[10] After the bill was passed by both houses, the Revisor of Statutes made technical changes to the bill. One of these changes was to the definition of "coastal zone" in AS 46.40.210 to change its terminology from plural to singular. See AS 01.05.031(b)(10). The language in the coastal zone definition was originally patterned after the federal definition in 16 U.S.C 1453 (l) which uses the plural instead or singular usage, for example, "coastal waters" instead of "coastal water" as used in the Revisor's corrections. Given that these technical changes are not to change the meaning of the substantive law (AS 01.05.031), the changes from the federal definition should not be construed to indicate a different meaning than the federal law because of the singular usage.

- DNR was to expeditiously adopt regulations implementing the revised consistency review process (6 AAC 50), but no later than July 1, 2004;
- July 1, 2004 – DNR was to adopt regulations implementing revised state-wide standards and district plan criteria (6 AAC 80 and 6 AAC 85, respectively);
- July 1, 2005 – Coastal districts were to review their existing plans, revise as necessary, and submit them to DNR for review and approval under AS 46.40, as amended, and 6 AAC 85, as amended; and
- July 1, 2006 – Existing coastal district plans were to sunset (except for those submitted by July 1, 2005 and approved by DNR).

Complying with the mandate of HB 191 to formulate new regulations by the mandated deadlines, OPMP worked to develop regulations to the consistency review process (and other chapters of ACMP implementing regulations) as mandated by HB 191.

The state agencies, federal agencies, coastal districts, and the public were involved in the process. ACMP staff held a District Teleconference on December 1, 2003 to prepare districts for the upcoming December conferences. The purpose of the teleconference was to familiarize the districts with HB 191 so they could effectively engage in the development of 6 AAC 50, 6 AAC 80 and 6 AAC 85. DNR held two ACMP district conferences, one in Anchorage and one in Juneau during December 2003. At both meetings, the DNR contractors detailed the program changes required by HB 191, discussed proposed changes, convened breakout sessions to enable stakeholders to work through examples using proposed new procedure and standards, and took detailed notes of comments and reactions from the districts and other conference participants for use later when drafting the proposed regulations. Draft regulations were presented informally and were the subject of the three-day statewide ACMP conference held in February.

Using public feedback to draft appropriate regulations, on February 20, 2004, OPMP released proposed changes to the regulations for public review and comment. DNR proposed in that notice to adopt regulations in Title 11 of the Alaska Administrative Code that added new chapter 11 AAC 150 to regulate the implementation of the ACMP, the coastal standards of the ACMP, and the district coastal management plan criteria; add regulations implementing the transfer of ACMP responsibilities from the CPC and DGC to DNR; and clarify and make specific all aspects of consistency review of a project with the ACMP and the general implementation of the ACMP. The proposed changes also added a new chapter 11 AAC 180 to clarify and make specific the application and implementation of the statewide coastal standards, and the general implementation

of the ACMP. The proposed changes also added new chapter 11 AAC 185 to clarify and make specific all aspects of district coastal management plan criteria and the review and approval process for district coastal management plans.

After the close of the public review and comment period (April 2, 2004), DNR considered the public comments on the proposed changes, and amended the regulations and adopted a revised version on May 3, 2004, which among other changes, renumbered the ACMP provisions as follows: the implementation of the ACMP was transferred from 11 AAC 150 to new 11 AAC 110; the statewide standards of the ACMP was transferred from 11 AAC 180 to new 11 AAC 112; and the district coastal management plan criteria was transferred from 11 AAC 185 to new 11 AAC 114. The revised regulations were adopted on May 24, 2004, under the authority of AS 46.39.010, AS 46.40.040. AS 46.40.096, and AS 46.40.100 and after compliance with the Administrative Procedure Act (AS 44.62), specifically including notice under AS 44.62.190 and 44.62.200 and opportunity for public comment under AS 44.62.210, and went into effect on July 1, 2004[11]. Contemporaneous with the adoption, DNR issued a 51-page "Response to Public Comments" which provided detailed responses to specific public comments, sectional analyses of new concepts, and textual explanations of virtually every significant change in the draft regulations. Much of the guidance set forth in this response to public comments is incorporated in Chapter 3, "Discussion of Recent Changes to the ACMP."

On August 9, 2004, OPMP released a second set of limited proposed changes to 11 AAC 112 and 11 AAC 114 for public review and comment. After consideration of public comments on the proposed changes, DNR amended the regulations and adopted revised versions of 11 AAC 112 and 11 AAC 114 on September 24, 2004, which became effective October 29, 2004.

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[11] On July 1, 2004, 11 AAC 110, 112 and 114 became effective as state regulation. However, as described in 11 AAC 112.010, "the standards of 11 AAC 112.200 – 11 AAC 112.990 apply only to consistency reviews initiated after the date the commissioner certifies to the lieutenant governor that the United States Department of Commerce has approved, under 16 U.S.C. 1455(e), the standards of 11 AAC 112.200 – 11 AAC 112.990…. [T]he standards of 6 AAC 80.040 – 6 AAC 80.900 apply to consistency reviews initiated before that date." Thus, until NOAA's OCRM approves the statewide standards at 11 AAC 112.200 – 11 AAC 112.990, the ACMP coordinating agency will conduct consistency reviews using the existing standards at 6 AAC 80.040 – 6 AAC 80.900. Once OCRM has approved the standards at 11 AAC 112.200 – 11 AAC 112.990, DNR will notify participants of the applicable standards, and the date on which they become applicable. DNR anticipates OCRM approval of the standards at 11 AAC 112.200 – 11 AAC 112.990 around March 2005. For purposes of a coastal district preparing a plan revision under 11 AAC 114, the standards at 11 AAC 112 and the district plan requirements at 11 AAC 114 should be used. In other words, even though the statewide standards at 11 AAC 112.200 – 11 AAC 112.990 will not yet be applicable, the districts should write their revised district plans, which are due July 1, 2005, as if they were. Existing district plans and enforceable policies that were approved by the Coastal Policy Council (CPC) remain in effect until July 1, 2006, unless DNR reviews and approves new enforceable policies prior to that date.

Section 10.2.3: Sectional Analysis of SB 102

- Sections 1 - 14 and 18 work in concert with sec. 22 to repeal the ACMP, by removing all references to the ACMP from the statutes. The intent of these sections is to provide the legislature with a mandatory review of the ACMP's efficacy at a date certain in the future after the program, its coastal district plans, and the ABC List revisions have been approved and implemented. The date on which secs. 1 - 13 and 18 take effect, without preemptive legislative intervention to amend the repeal provisions, is July 1, 2011, as established in sec. 22.

- Section 16 amends the provision of HB 191 that "sunsets" existing coastal district management programs, including the programs' enforceable policies, on July 1, 2006. Section 16 extends this date by eight months, to March 1, 2007. Section 16 acts in concert with sec. 17, which as discussed below, extends the deadline for coastal resource districts to submit to the DNR revised coastal management plans. The final bill provided for an eighth-month extension to ensure that the legislature would be in session at the time, to provide emergency evaluation and intervention if appropriate. Section 16 does not change HB 191, sec. 46(c)'s language "…unless the Department of Natural Resources disapproves or modifies all or part of the program…." This language allows the DNR to affirmatively disapprove any coastal district management program that has not submitted its plan revision by the amended deadline that is established by sec. 17.

- Section 17 amends sec. 47(a) of HB 191, which requires each coastal resource district to review its existing coastal district management program and submit to the DNR for review and approval a revised coastal district management program "within one year after the effective date of regulations adopted by the Department of Natural Resources implementing changes to AS 46.40.010 - 46.40.090 … or by July 1, 2005, whichever is later." The ACMP regulations at 11 AAC 110, 11 AAC 112, and 11 AAC 114 implementing the statutory revisions mandated by HB 191 took effect July 1, 2004. Thus, the one-year window provided by sec. 47(a) for districts to submit revised plans began running on July 1, 2004. The deadline for submission of revised district coastal management plans is thus July 1, 2005. Section 17 extends this date by eight months, to March 1, 2006. That date ensures that the legislature will be in session at the time, to provide emergency evaluation and intervention if appropriate.

- Section 19(a) repeals district enforceable policies that are in conflict with state law. The purpose of this provision was to mandate compliance with Chapter 28,

SLA 2002 (SB 308), which became effective May 30, 2002. Section 3(a) of SB 308 required any "coastal district management program that is not consistent with AS 46.40.030(b) … to submit … within one year after the effective date of this Act, program modifications to conform the program to the requirements of AS 46.40.030(b)…." At the time SB 308 was passed, AS 46.40.030(b) stated in part, "a coastal district may not incorporate by reference statutes and administrative regulations adopted by state agencies." This provision of AS 46.40.030(b) was intended to include the concept of the "DEC carveout," which was clarified and mandated in the subsequent HB 191. Section 3(b) of SB 308 gave the Coastal Policy Council (CPC) the permissive right to "enter an order deleting the incorporation by reference of statutes and administrative regulations in violation of AS 46.40.030(b)…." However, the CPC never availed itself of its authority under SB 308 to delete noncompliant references within coastal district management programs. Because Executive Order 106 transferred both the CPC and the function of the DGC to DNR, the burden of repealing district enforceable policies that incorporate statutes and administrative regulations adopted by state agencies, including subject matter addressed by DEC, fell to DNR. However, DNR did not act on its SB 308 authority, either. With this history in mind, the legislative intent of Section 19(a) is to explicitly repeal coastal district enforceable policies that duplicate, restate, or incorporate by reference existing state or federal statutes and administrative regulations, or that address any matter regulated by DEC. As a consequence of this provision, DNR must draft implementing regulations under its emergency authority granted under Section 20 of the Act.

- Section 19(b) mandates that, within two years after NOAA approves Alaska's amended ACMP, that DNR review and update all categorically consistent ("A List") or generally consistent ("B List") ACMP approvals. Because comprehensive updating of the lists has not occurred since 1995, this measure ensures that the updates are enforced by a legislatively mandated deadline. Moreover, the section mandates that continued review and update of the lists occurs at least every four years thereafter. Last, the section requires that the review and update shall conform to the requirements of AS 46.40.096(m), which requires in part that the A List and B List "be as broad as possible so as to minimize the number of projects that must undergo an individualized consistency review under this section."

- Section 20 declares as an emergency DNR's need to adopt regulations implementing the Act. This provision was necessary to allow DNR to adopt technical regulatory amendments in conformance with the Act on an expedited basis, in part to allow the state to submit to NOAA a complete ACMP

amendment package to ensure timely preliminary approval from NOAA by July 1, 2005.

- Section 21 amends HB 191 which contained a "sunset" provision at Section 45 that annulled the statewide ACMP standards at 6 AAC 80.010 – 6 AAC 80.900, and the district coastal management plan requirements at 6 AAC 85.020 – 6 AAC 85.900. HB 191's Section 49 gave Section 45 an effective date of July 1, 2005. Section 21 of this Act extends the effective date of Section 45 by 20 months, to March 1, 2007. This extension is important to retain the state's ability to conduct state and federal consistency reviews under 11 AAC 110 using federally approved state standards until the revised state standards and district coastal management plan requirements are federally approved. The amended annulment date is intended to allow NOAA sufficient time to complete its review and approval of the amended ACMP, after which the new statewide standards at 11 AAC 112 will take effect and be applicable to state and federal consistency reviews conducted under 11 AAC 110.

- Section 22 works in concert with Sections 1 – 14 and Section 18 to repeal the ACMP, and establishes the effective date for those sections as July 1, 2011. Section 22 also specifies that if the ACMP, as amended, is not timely approved by NOAA by January 1, 2006, then the ACMP would sunset on May 10, 2006. As with Sections 16 and 17, the May 10, 2006 sunset date will ensure that the Legislature would be in session at the time to provide emergency evaluation and intervention if appropriate. The Section also requires the DNR Commissioner to provide notice to the revisor of statutes of the lack of timely federal approval on February 1, 2006.

  Section 23 provides an effective date of the Act. Except Section 22, as described above, the Act is effective immediately when signed into law, which the Governor did on May 26, 2005.

Section 10.3: Description of the Regulatory Changes to 11 AAC 110

As described in Section 10.2 of this chapter, the OCRM approved as a routine program change the comprehensive regulatory revisions at 6 AAC 50 on November 27, 2002. Many of the subsequent regulatory changes now included within 11 AAC 110 are predicated on the statutory revisions to AS 46.40. As such, much of the discussion that follows in this section references the statutory changes.

This amendment package includes a mark up version of the regulations that identify the specific changes made to the three chapters of ACMP regulations, available on line at www.alaskacoast.state.ak.us.

Subsection 10.3.1: Coordinating Agency

OPMP will coordinate the consistency review and determination process for federal activities (AS 46.39.010) and activities that require a federal authorization, regardless of whether a state resource agency authorization is required (AS 46.39.010). Amendments at 11 AAC 110.030 address the obligations and requirements of the ACMP lead agency, OPMP. The changes are clarifying the role of OPMP and eliminating reference to the former Division of Governmental Coordination. OPMP also coordinates activities that require authorizations from multiple state resource agencies (DNR, DFG, and DEC) (AS 46.39.010), and activities that require authorizations from multiple DNR offices (Divisions of Agriculture, Forestry, Mining, Land and Water, and Oil and Gas, and the Office of Habitat Management and Permitting).

For projects requiring authorizations from only a single DNR office, that office will coordinate the consistency review and determination process. For projects requiring authorizations from only a single state resource agency (e.g., DEC or DFG), that agency will coordinate the consistency review and determination process. Amendments at 11 AAC 110.050 address the authorities, obligations, and responsibilities of the participating state agencies.

A resource agency shall, except as provided in 11 AAC 110.040(c), serve as the coordinating agency for a consistency review and render the consistency determination for a project that requires one or more authorizations from only that resource agency, and does not require a federal consistency determination or federal consistency certification. The resource agency shall issue authorizations in conformity with the enforceable policies of approved district coastal management plans and the statewide standards. Also, if a project requires one or more authorizations from only a single resource agency, the resource agency may incorporate a consistency determination into the resource agency's authorization document for a project if a consistency review is conducted and the consistency determination is rendered in accordance with AS 46.40 and 11 AAC 110.200 – 11 AAC 110.270. The amendments to this section include the incorporation of previously approved regulations within the section for general application, as well as needed clarification for the participating agency requirements within the consistency review process.

Federal consistency reviews include federal activities and non-federal activities that require a listed federal authorization. Federal consistency reviews are coordinated by OPMP (AS 46.39.010). For federal consistency reviews, OPMP will complete a review under AS 46.40.096 of all policies applicable to the project.

If the federal consistency review requires a DEC authorization, OPMP will issue a cover letter for DEC indicating DEC objection or concurrence when DEC completes its permit review and finding of compliance with the DEC statutes listed in AS 46.40.040(b).

Subsection 10.3.2: Trigger and Scope of Review

The consistency review process applies to any project that is a "federal agency activity" affecting the uses and resources of the state's coastal zone, as described in 16 U.S.C. 1456, 15 C.F.R. Part 930, Subpart C, and AS 46.40.040(b)(2); an activity within the coastal zone that requires any federal license or permit as listed in 11 AAC 110, and as described in 16 U.S.C. 1456, 15 C.F.R. 930, Subparts D and E, and AS 46.40.096(b)(2); and an activity within the coastal zone that requires any state authorization as listed in 11 AAC 110, except for those activities covered by the exclusions in the Forest Resources and Practices Act (AS 41.17).

AS 46.40.096(j) describes the trigger for a consistency review as an activity within the geographical areas described in (*l*) that is subject to a state resource agency permit, lease, authorization, approval or certification.[12] In addition, federal law at 16 U.S.C. 1456 and 15 C.F.R. Part 930 provides that federal activities and activities requiring a federal authorization affecting coastal uses or resources within the coastal zone may trigger a consistency review. See AS 46.39.010(a) (DNR "shall render, on behalf of the state, all federal consistency determinations and certifications authorized by 16 U.S.C. 1456"). The only exception to the AS 46.40.096(j) trigger is the exception to the consistency review requirements contained in the Forest Practices Act (AS 41.17). It is important to note that a project that includes an activity subject to a DEC permit triggers a consistency review under AS 46.40.096(j). However, activities subject to the DEC permits are excluded from the scope of the review as provided in AS 46.40.096(k) and AS 46.40.040(b). The other activities of a project undergoing a DEC single agency consistency review or a DNR lead consistency review are reviewed against the enforceable policies described in AS 46.40.210.

Once the project has "triggered" a consistency review, the scope of the project must be determined. AS 46.40.096(g) and (k) identify the scope of review for a project as follows. For a project that is proposed by a federal agency, the

[12] Those geographical areas are (1) activities within the coastal zone, and (2) activities on federal land, including the federal outer continental shelf, that would affect any land or water use or natural resource of the state's coastal zone; for purposes of this paragraph, those activities consist of any activity on the federal outer continental shelf and any activity on federal land that are within the geographic boundaries of the state's coastal zone notwithstanding the exclusion of federal land in 16 U.S.C. 1453(1).

scope is defined in 16 U.S.C. 1456 and 15 C.F.R. Part 930, Subpart C. For a project that requires a federal authorization (regardless of whether a state authorization is required), the scope is defined in 16 U.S.C. 1456 and 15 C.F.R. Part 930, Subpart D. For a project that requires only state authorizations (one or more), the scope is defined at AS 46.40.096(g) and (k) as, except for those noted exceptions, those activities that are located within the areas defined in AS 46.40.096(*l*) that are subject to a state resource agency authorization, or are the subject of a coastal resource district enforceable policy (see also the discussion above on DEC). In other words, except as provided in the phasing statute (AS 46.40.094) and the Forest Practices Act (AS 41.17), AS 46.40.040(b) and AS 46.40.096(g), the scope of a consistency review is limited to activities subject to the permit or authorization and a coastal resource district policy approved by DNR.

For those projects that require a state or federal authorization, the coordinating agency must determine what activities of the project the applicant has identified as the scope of the consistency review, as well as those activities of the project that are subject to state resource or federal agency authorizations or are the subject of a district enforceable policy. The scope of the consistency review is limited to these activities and components of the project, with the following exceptions:

- General and nationwide permits that have previously been determined to be consistent with the ACMP [AS 46.40.096(g)(1)(A)];
- The DEC statutory and regulatory determinations excluded from the consistency review by virtue of AS 46.40.040(b);
- Activities excluded under the Forest Resources and Practices Act (AS 41.17) [AS 46.40.096(g)(2)];
- An authorization or permit issued by the Alaska Oil and Gas Conservation Commission [AS 46.40.096(g)(3)]; and
- An activity that is subject to exclusion as a categorical or general consistency determination under 11 AAC 110.700(c).

The scope of the review should explain that the components of the project authorized by the above authorities are not part of the ACMP review under 11 AAC 110. As more fully described below, the scope of review for the DEC exclusion will explain that the DEC requirements are being reviewed separately by DEC. With respect to those portions of a project subject to DEC regulatory requirements, DEC will make its determination for that portion of the project under its regulatory procedures, and will coordinate with OPMP as part of the lead agency process. While the activities regulated by DEC are reviewed separately, the coordinating agency should review the activities of the project within the scope of the review for consistency with the other statewide standards in 11 AAC 112 and the applicable

district enforceable policies, including those activities that are the subject of an affected district's enforceable policies.

Subsection 10.3.3: DEC "Carveout"

The CZMA at 16 U.S.C. 1456(f) provides that the state's water and air pollution requirements "be incorporated in any program developed pursuant to this title and shall be the water pollution and air control requirements applicable to such program." The original air, land, and water quality standard in 6 AAC 80.140 provided that -- irrespective of any provision in the program to the contrary -- DEC's standards were the standards of the program for those purposes and the procedures and determinations of DEC were to establish consistency. ACMP FEIS at pp. 77-78.

Unfortunately, past program implementation did not incorporate the intent and legal requirements of this management approach. The result was a duplication of efforts and lack of regulatory focus that delayed and frustrated effective operation of the ACMP consistency review process – and eventually, to the legislature passing HB 191.

One of the major reforms of HB 191 was to effectuate the direct state implementation of DEC's air, land and water quality standards as originally mandated in 1979 and approved by OCRM. HB 191 made three DEC-related reforms.

First, HB 191 specifically provides that DEC's air, land and water quality standards are the exclusive standards of the ACMP for those purposes. AS 46.04.040(b). In other words, DEC's standards adequately address these regulatory matters for ACMP purposes. Coastal districts may not plan for or establish any enforceable policies setting air, land or water quality standards that are the within the statutory or regulatory domain of DEC, including, but not limited to, the following subject areas:

- Prevention, control and abatement of any water, land, subsurface land, and air pollution, and other sources or potential sources of pollution of the environment;
- Prevention and control of public health nuisances;
- Safeguard standards for petroleum and natural gas pipeline construction, operation, modification, or alteration;
- Protection of public water supplies by establishing minimum drinking water standards, and standards for the construction, improvement, and maintenance of public water supply systems;

- Collection and disposal of sewage and industrial waste;
- Collection and disposal of garbage, refuse, and other discarded solid materials from industrial, commercial, agricultural, and community activities or operations;
- Control of pesticides;
- Handling, transportation, treatment, storage, and disposal of hazardous wastes;

Second, the issuance of DEC permits, certifications, approvals, and authorizations establishes consistency with the ACMP program for those activities of a proposed project[13] subject to those permits, certifications, approvals or authorizations. AS 46.04.040(b)(1). This concept is a statutory restatement of the 6 AAC 80.140 air, land and water quality standard (now 11 AAC 112.310). This self-implementing concept is provided for in 11 AAC 110.010(b). Consequently, with the exception of AS 46.40.040(b)(2) -- where there is no DEC authorization "because the activity is a federal activity or the activity in located on federal land" -- the consistency review process in 11 AAC 110 does not include air, land or water quality determinations. DEC permit issuance is not tied to federal or state consistency review deadlines since those authorizations are self-implementing and are not required to meet the consistency review deadlines or procedures to take effect as to federal agencies or private persons.

Third, while DEC air, land, and water quality standard determinations are not made through 11 AAC 110, the requirement of a DEC authorization may trigger consistency reviews of other activities of a larger project. As provided by AS 46.40.096(j), a project that includes an activity subject to a DEC authorization on the “C List” may be subject to review under 11 AAC 110 if the project includes a different activity that is not subject to a DEC authorization but is the subject of an enforceable district policy. The specific activities subject to the DEC authorization are not within the scope of those project activities to be reviewed. See 11 AAC 110.020(c) defining the scope of the project subject to consistency review. In the case of a DEC single agency review, the scope of review is limited to an activity that is “the subject of a district enforceable policy.” 11 AAC 110.020(C)(2); 11 AAC 110.040(c).

[13] A “project” means all activities that will be part of a proposed development [AS 46.40.210(14)]. Activities excluded from a consistency review include those authorized by the DEC, Alaska Oil and Gas Conservation Commission, the Alaska Forest Practices Act (AS 41.17) and general or nationwide permits (AS 46.40.096(g)). The scope of a DEC single agency project consistency review is further limited to only those activities in Alaska’s coastal zone that are the subject of a coastal resource district enforceable policy (AS 46.40.096(k).

As a matter of DEC policy, DEC may choose to waive a 401 Certification for a Corps of Engineers' (COE) permit, if DEC determines that the activity is *de minimis* in nature and not subject to further consistency review under 11 AAC 112.310. However, state agencies and members of the public may choose to comment to OPMP on any effects the project may have on water quality. OPMP may then consult with DEC to determine whether the comments have merit.

For further analysis of the 11 AAC 110 DEC carveout, a sectional analysis follows:

- AS 46.40.096(g) states that activities previously authorized under a general or nationwide permit, or subject to a DEC authorization described in AS 46.40.040 shall be excluded from the consistency review and determination process. This new section removes the duplication of DEC's permitting review process in a consistency review. The specific activities regulated by DEC are not to be included in the consistency review process, and are not considered part of the scope of the project subject to review under AS 46.40.096(k).
- AS 46.40.040(b)(1) establishes that AS 46.03, AS 46.04, AS 46.09, and AS 46.14, and the implementing regulations, constitute the exclusive enforceable policies for those purposes.
- AS 46.40.040(b)(2) addresses activities that do not require a DEC authorization because the activity is a federal activity, or is located on federal lands or a part of the outer continental shelf (OCS). In these cases, under 11 AAC 112.310, the activities must still be found consistent with DEC's standards, even though the activity does not require a DEC authorization. So in order to achieve the federally mandated coordinated consistency review DEC, nonetheless, applies its regulatory standards to the proposed activity and forwards its findings to OPMP to include in the state consistency determination. This section conforms with the existing Air, Land, and Water Quality standard at 11 AAC 112.310 and the CZMA's requirement that the state's air and water quality standards be included in the state's coastal program.
- 11 AAC 110.010. Applicability of the Alaska coastal management program consistency review process. This section makes a clear distinction between AS 46.40.040(a) DEC authorizations which are implemented through DEC's procedures and the consistency review process under AS 46.40.096.
- 11 AAC 110.010(a) explains that chapter 110 sets out the consistency review process called for in AS 46.40.096.
- 11 AAC 110.010(b) provides that activities that are subject to authorization by DEC under AS 46.04.040(b)(1) are excluded from the consistency review process. In the case of a DEC-only authorization project, only activities

outside the activities addressed by the DEC authorization and are the subject of a district enforceable policy are subject to a consistency review under AS 46.40.096. See 11 AAC 110.040.

- 11 AAC 110.010(b)(1) explains that DEC authorizations are self-implementing since they are matters of direct state authorization under 16 U.S.C. 1455(d)(11)(B) and are not coordinated under chapter 110. See also 11 AAC 110.040b).
- 11 AAC 110.010(b)(2) requires that DEC provide its findings under AS 46.40.040(b)(2) when there is no DEC authorization "because the activity is a federal activity or the activity in located on federal land" by the review deadlines in article 3 for federal activities, and article 4 for federal authorizations.
- 11 AAC 110.030(e) provides that OPMP will coordinate with DEC and issue its findings under AS 46.04.040(b)(2) where there is no DEC authorization because the activity is a federal activity or the activity in located on federal land.
- 11 AAC 110.040. This section provides the procedure for DEC limited consistency reviews. Subsection (a) explains that this section addresses projects that are subject only to a DEC authorization on the "C List".
- 11 AAC 110.040(b) provides that those specific aspects of a project subject only to a DEC authorization on the "C List" are excluded from the scope of a consistency review under this chapter.
- 11 AAC 110.040(c) explains the review of activities outside of those authorized by the DEC permit which are the subject of district enforceable policy. Subsection (c) references just the district policy scope section of .020(c)(2).
- 11 AAC 110.040(d) provides that DEC or OPMP, if agreed to by DEC and OPMP, will conduct the limited consistency review described in (c) using the article 2 procedures after determining scope in consultation with the district.

AS 46.40.096(p) states that a consistency review and determination for those activities not subject to a DEC authorization "… may not be delayed or withheld pending issuance of the permits, certifications, approvals, and authorizations …" from DEC, "… but shall proceed regardless of the status of those permits, certifications, approvals, and authorizations." This means that an applicant may need two "determinations" to be consistent with the ACMP: (1) the coordinating agency's final consistency determination under AS 46.40.096; and (2) DEC's permit authorizations as a finding of compliance under AS 46.40.040(b). However, the coordinating agency's issuance of the final consistency determination may not be held up waiting for the DEC permit authorization issuance. Though the federal consistency review "determinations" may proceed on separate paths and

time frames, the issuance (or denial) of the DEC authorization must still be achieved within the timeframes established in 15 C.F.R. 930.

Subsection 10.3.4: Phasing

AS 46.40.094(a)(2) was amended to broaden the statute that describes how a project may be reviewed for consistency with the ACMP in "phases." The amendment broadened the phasing statute to allow projects other than traditional oil and gas leasing projects to be reviewed in phases. The phasing test is changed from whether future information is "obtained in the course of a phase" to whether the information "was not available to the project applicant at the time of the previous phase." This change makes the language consistent with the federal coastal management regulations allowing for phasing of federal activities subject to a consistency review in 15 C.F.R. 930.36(d).

It is important to note that the test for phasing is whether the information is available to the applicant, not whether the applicant chooses to obtain the information or make the information available.

Subsection 10.3.5: ABC List

AS 46.40.096(m) added the requirement that DNR establish in regulation the state resource agency permits and federal permits that trigger a consistency review. The subsection also directs DNR to establish by regulation categories and descriptions of uses and activities that are determined to be consistent with the ACMP or that would be made consistent with the inclusion of standard alternative measures. The existing list of such activities is known as the "ABC" list. The new legislation directs that these categories and descriptions of uses and activities be reviewed by DNR and made as broad as possible so as to minimize the number of projects that must undergo an individualized consistency review. AS 46.40.096(m) establishes the statutory authority for the ABC List which has been part of the ACMP consistency regulations since 1984.

The ABC List, as incorporated into the ACMP, was adopted by reference as part of the regulation changes. The adoption by reference occurs at the following sections: 11 AAC 110.710 - adoption of the "A List" (the categorically consistent determinations for expedited consistency reviews); 11 AAC 110.730 - adoption of the "B List" (the generally consistent determinations for expedited consistency reviews); and 11 AAC 110.750 - adoption of the "C List" (the list of state resource agency authorizations that authorize activities that may have a reasonably foreseeable direct or indirect effect on a coastal use or resource).

The ABC List was formerly approved by OCRM as a program change to the ACMP in 1995, with minor modifications approved in 1999 and 2002. As part of the adoption process of the ABC List into the proposed regulation changes, technical edits and updates reflecting prior consistency review determinations were made.

Subsection 10.3.6: Timing

AS 46.40.096(n) and (o) establish a 90-day deadline for completing a consistency review. AS 46.40.096(p) expressly states that a consistency review under AS 46.40.096 may not be held up by a DEC or other permit excluded under AS 46.40.096(g).

The statutory requirements were implemented in 11 AAC 110.265. There, amendments were made to clarify that the coordinating agency must render the final consistency determination within 90 days after receipt of a complete application, with the following exceptions. The 90-day time limitation does not apply to a consistency review involving the disposal of an interest in state land or resources, and is suspended from the time the coordinating agency determines that the applicant has not adequately responded in writing within 14 days after receipt of a written request from the coordinating agency for additional information under 11 AAC 110.240, until the time the coordinating agency determines that the applicant has provided an adequate written response. The time limitation is also suspended during a period of time requested by the applicant and during the period of time a consistency review is undergoing an elevation under 11 AAC 110.600.

In addition, an amendment was made to the timing of the final consistency determination such that findings are to be rendered five days after issuance of the proposed consistency determination, rather than after receipt by the review participants of the proposed consistency determination.

Subsection 10.3.7: Elevations

Amended AS 46.40.096(d) streamlines the elevation process by having elevations heard by DNR rather than the three state resource agencies. Within five days after the coordinating agency issues a proposed consistency determination or proposed consistency response, a resource agency, applicant, or affected coastal resource district that does not concur with the proposed consistency determination may request an elevation to the commissioner of the proposed consistency determination or consistency response. The elevation is limited to consideration of the proposed consistency determination or consistency response regarding whether the project is consistent with the enforceable policies of the program, or any

alternative measure or other project modification that would achieve consistency with the enforceable policies of the program.

A request for elevation is still directed to the agency coordinating the consistency review, but the elevation will be decided by the DNR Commissioner. The agency coordinating the consistency review will invite the coordinating agency, the resource agencies, the applicant, any affected coastal resource district to participate in, and any other affected person to attend an elevation meeting with the commissioner or delegee. Attendees may present written materials and testimony or may rely on the existing project record. Within 45 days after receipt of the request for elevation, the commissioner or delegee will issue a written decision with findings of fact, and the coordinating agency shall then renders a final consistency determination.

Subsection 10.3.8: Termination of a Consistency Review

To address the ongoing problem of open project review files, a new section at 11 AAC 110.810 was added to provide the coordinating agency with a process for terminating inactive project review files. The project review file can be terminated if the applicant fails within 30 days to respond to the coordinating agency's request for additional information, or submits a written request withdrawing the project from review under this chapter.

For a terminated project, the coordinating agency must issue a written objection to the applicant's consistency certification.

Section 10.4: Description of the Regulatory Changes to 11 AAC 112

This amendment package includes a mark up version of the regulations that identify the specific changes made to the three chapters of ACMP regulations, available on line at www.alaskacoast.state.ak.us.

Subsection 10.4.1: Coastal Waters

Throughout the draft regulations, application of particular standards have been limited to "coastal waters," or waters "having a direct and significant impact on coastal waters." These sections include the following: coastal access at 11 AAC 112.220, sand and gravel extraction at 11 AAC 112.260, important habitats definition at 11 AAC 112.300(c), rivers, streams, and lakes definition at 11 AAC 112.990(27), wetlands definition at 11 AAC 112.990(34), and coastal zone boundaries at 11 AAC 114.220. In turn, "coastal waters" has been redefined as

"contain[ing] a measurable quantity or percentage of sea water." 11 AAC 112.990(7).

The amended regulations limiting many enforceable standards to seawater areas was a policy-level decision reflecting an examination and analysis of the true objectives of the CZMA and the ACMP. The first step in the analysis is to examine the ACMP's federal precursor, the federal Coastal Zone Management Act of 1972 (CZMA). When Congress passed the CZMA in 1972, one of the Congressional Findings was, "Land use in the coastal zone, and the uses of adjacent lands which drain into the coastal zone, may significantly affect the quality of coastal waters and habitats, and efforts to control coastal water pollution from land use activities must be improved." 16 U.S.C. § 1451(k) (emphasis added). The Congressional declaration of policy at 16 U.S.C. § 1452 similarly limited application of the Act to "the resources of the Nation's coastal zone." The CZMA defines "coastal zone" as:

> the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches…. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters, and to control those geographical areas which are likely to be affected by or vulnerable to sea level rise.

The CZMA's implementing regulations at 15 CFR 923.3(a) describe the general requirements of the states' coastal management programs: "The management program must provide for the management of those land and water uses having direct and significant impact on coastal waters and those geographic areas which are likely to be affected by or vulnerable to sea level rise." (emphasis added).

The definition of "coastal waters" in this part is noted in 15 CFR 923.2(h) to "have the same definition of as provided in Section 304 of the [Coastal Zone Management] Act." The CZMA defines "coastal waters" at 16 USC 1453(3) as "those waters, adjacent to the shorelines, that contain a measurable quantity or percentage of sea water, including but not limited to sounds, bays, lagoons, bayous, ponds, and estuaries." Thus, there is no evidence that the CZMA directed or invited states to regulate lands not directly tied to coastal waters, which by definition "contain a measurable quantity or percentage of sea water."

When the Alaska legislature passed the ACMP in 1977, the Legislative Findings repeated the same themes of the CZMA, substituting "coastal area" for "coastal zone": "the coastal area of the state is a distinct and valuable natural resource of concern to all the people of the state…. in order to promote public health and welfare, there is a critical need to engage in comprehensive land and water use planning in coastal areas…" OCS SCS CSHB 342, Chapter 84, Section 1. The Legislative Policy section states,

> It is the policy of the state to … (3) develop a management program which sets out policies, objectives, standards and procedures…involving uses and resources which have a direct and significant impact upon the coastal land and water of the state.

The 1979 ACMP FEIS, discussing the "Areas Subject to the ACMP," discusses this concept of tying the regulations to the shorelines. Recognizing the CZMA's boundary identification requirement at Section 305(b)(1), the FEIS describes the "inland boundaries" as:

> 'those areas the management of which is necessary now or is likely to be necessary in the near future to control uses which have a direct and significant impact on coastal waters,…' plus special management areas, transitional and intertidal areas, salt marshes and wetlands, islands, and beaches. (Emphasis added).
> …
> "The method which was used for determining the ACMP boundaries was to survey the general relationships between the marine environments and the terrestrial environment. These include geophysical relationships such as water flow, salt water intrusion, tidal actions, erosion, wave fetch, salt spray, flooding, storm and tsunami surges and run-up, ice movement, glacial activity and the like."

ACMP FEIS, pp. 109-110.

The FEIS thus clearly describes the "ACMP boundaries" in terms of saltwater presence or direct influence. This interpretation makes sense, considering that it was taken directly from the CZMA and its implementing regulations cited above (15 CFR 923.3(a)), which defines "coastal waters" as "contain[ing] a measurable quantity or percentage of sea water."

After careful deliberation, DNR amended the regulations to limit application of various standards in the draft regulations to "coastal waters," and amended the definition of "coastal waters" to parallel the federal definition:

> "'Coastal water' means those waters, adjacent to the shorelines, that contain a measurable quantity or percentage of sea water, including sounds, bays, lagoons, ponds, estuaries and tidally influenced waters." 11 AAC 112.990(6).

DNR concluded that the ACMP was never intended to be a surrogate for statewide natural resource protection throughout, or even deep into, the state. Rather, the ACMP was designed, as articulated succinctly in the 1979 FEIS, "designed to provide for the management of the 33,000 miles of Alaska's coastline." ACMP FEIS, p. 33. The draft regulations have sought to realign the ACMP with these concepts.

If the state is truly in need of comprehensive inland resource-protection measures, then DNR stands behind any effort to develop that legislation. But DNR does not see the wisdom of using the ACMP, a relatively procedural coordination-oriented statute for performing coastal consistency reviews, as the vehicle to include these vast and controversial interior environmental resource protection measures. This can, and should, be a dialogue undertaken by the state as a whole to accomplish those purposes.

Notwithstanding all of the above, DNR certainly recognizes the unique character of Alaska's rivers, streams, and lakes, and has gone significantly beyond these basic CZMA requirements. For example, the definition of rivers, streams, and lakes is not limited to water bodies having a direct and significant impact on coastal waters, as some commentors mistook. Rather, the definition includes the portions of the river, streams, or lakes that are catalogued anadromous, or not catalogued anadromous but still determined by DNR to exhibit evidence of anadromous fish. Obviously, these ACMP-defined water bodies extend well into the interior of the state, and answer many commentors' concerns that the draft standards prevent districts from writing enforceable policies anywhere but near the shoreline.

Subsection 10.4.2: Public Participation and Information

The Public Participation and Information section formerly in the statewide standards section at 6 AAC 80.020 was deleted from this chapter and moved to 11 AAC 114.010.

Subsection 10.4.3: Coastal Development (11 AAC 112.200)

This section was changed insubstantially. As discussed below in Section 10.5 describing the regulatory changes to 11 AAC 114, the coastal development

standard sets forth a requirement that the districts prioritize the uses and activities in the coastal area based upon whether the uses are water dependent, water-related, or neither but without an inland alternative. It is a requirement that the more water-dependent the use or activity, the higher priority it shall receive. 11 AAC 112.200(c) makes minor modifications to the title and adoption date of the COE 404 permitting authority. It is important to note that the inclusion of this federal citation was approved in the original regulations at 6 AAC 80.

Subsection 10.4.4: Natural Hazard Areas (11 AAC 112.210)

This section amended the former geophysical hazard areas standard at 6 AAC 80.050. It is important to understand that the federal CZMA does not mandate the expansive standard contained in the original 6 AAC 80.050 or the broadened natural hazard standard in 11 AAC 112.210. The CZMA only requires that state coastal programs address a planning process for the issues of coastal erosion, flood areas, storm surge and similar coastal issues. 16 U.S.C. § 1455(d)(2)(I); 1452(2)(B); 15 C.F.R. §923.25. The CZMA and ACMP was never intended to be a statewide standard for seismic safety, structural building codes or the like.

Notwithstanding the lack of a federal requirement, the new standard actually broadens the coverage of the old geophysical hazards standard and allows coastal districts to both identify additional natural hazards not identified under 11 AAC 112.990 and designate natural hazard areas in their district plans. See 11 AAC 114.250(b). Perhaps most importantly, the standard recognizes that municipalities retain their Title 29 zoning and building code authorities to address the project details of natural hazard mitigation measures.

DNR proposed changes to the old geophysical hazard standard to provide greater certainty regarding what constitutes a hazard and what is meant by "siting, design, and construction measures for minimizing property damage and protecting against loss of life has been provided." The new natural hazards standard at 11 AAC 112.210 recognizes that building codes and safety and engineering standards are the appropriate mechanism for addressing these types of issues in the context of a project consistency review. Section (b)(2)(B) involving the judgment of a project engineer only applies in the absence of local codes and standards and still involves "the judgment of the coordinating agency, in consultation with . . . state and local agencies with expertise."

DNR has also improved the existing standard by providing for the designation of natural hazards as a planning function, and in advance of a consistency review. DNR has amended the section to provide for coordinating

agency consultation with appropriate natural hazard experts in the Division of Geological & Geophysical Surveys, the flood program in the Department of Community and Economic and "other local or state agencies with expertise." The new standard allows state agencies to identify natural hazard areas during a project review. The definition in 11 AAC 112.990 has been amended to require demonstration of a scientific basis and supporting evidence of the designation of additional natural processes or adverse conditions as "natural hazards."

Subsection 10.4.5: Coastal Access (11 AAC 112.220)

The substance of this new state standard was formerly included in the Recreation standard at 6 AAC 80.060(b). The state felt that its addition, giving a statewide standard mandating at least maintenance of, and possibly enhancement of, public access to Alaska's coastline, would be in the best interests of the state.

Note that the standard does not require that roads, docks and other facilities provide access to and along coastal water. Rather, 11 AAC 112.220, as amended, requires that districts and the state maintain, and where appropriate, increase coastal access. Thus, whether compliance with the access standard involves creation of docks or other access facilities is a case-by-case factually specific issue.

Subsection 10.4.6: Energy Facilities (11 AAC 112.230)

This standard was amended in several ways. The most significant change was the substitution of the requirement that energy facility siting be based upon the standards set out in 11 AAC 112.230(a)(1)-(16) "to the extent practicable" instead of "to the extent feasible and prudent." This change was also made in coastal development at 11 AAC 180.040, utilities and roads at 11 AAC 180.080, mining and mineral processing at 6 AAC 80.110, and important habitats at 11 AAC 180.130(d). The term "practicable" is defined in 11 AAC 112.990(18) as "feasible in light of overall project purposes after considering cost, existing technology and logistics of compliance with the standards."

DNR recognized that the draft definition of "practicable" only took into account an evaluation of the economic impacts to the applicant of compliance with the standard; there was no cost-benefit analysis of the public benefit versus the environmental problems caused by the given project alternative under consideration. DNR believes that the ACMP regulations must achieve certain goals: responsible and sustainable resource development; due consideration of private, district, municipality, state, or federal stakeholders' rights; and an objective determination of whether the proposed development, in whole or in part, is in the

best interest of Alaska and use of the relevant resources. DNR amended the draft regulations to redefine "practicable" as follows:

> "practicable" means: ~~available and capable of being done after taking into consideration~~ feasible in light of overall project purposes after considering cost, existing technology and logistics ~~in light of overall project purposes~~ of compliance with the standards.

This amended definition of "practicable" accomplishes two things. First, it establishes that an applicant must comply with a given standard (e.g., to avoid adverse impacts to a given resource) unless compliance is not "feasible," as that term is qualified. In other words, if cost/logistics factors do not make compliance with the standard impracticable, then the standard must be met. This is actually a very stringent standard, arguably more restrictive than the previous "feasible and prudent" standard, which allowed use of an unpredictable balancing test to determine whether the standard must be met.

Second, the definition incorporates the term, "in light of overall project purposes." This term allows a project reviewer the discretion to examine the overall worth of the project as balanced against the impacts that it (or implementation of one of its component activities) might cause the coastal resources, the public benefit, the rights of individual or collective stakeholders, etc. This is a significant qualifier to an otherwise strictly economic "practicability" analysis.

Therefore, the definition of practicable, as amended, strikes a workable compromise between the interests of competing stakeholders.

DNR does not believe that this change would promote energy facilities being sited in otherwise productive habitat areas. Particularly in light of the new definition of "practicable" described below, the draft regulations require siting of energy facilities in conformity with sixteen criteria, including important considerations such as "to minimize adverse environmental and social effects," "to be compatible with existing and subsequent adjacent uses and projected community needs," "where development will require minimal site clearing, dredging and construction," to "minimize the probability, along shipping routes, of spills or other forms of contamination that would affect fishing grounds, spawning grounds, and other biologically productive or vulnerable habitats," and "so that design and construction of those facilities and support infrastructures in coastal areas of Alaska will allow for the free passage and movement of fish and wildlife with due consideration for historic migratory patterns."

Considering whether the regulations should be amended to require that energy facilities use best available oil spill technology, DEC's best available technology requirements at AS 46.04.030 provide the ACMP standards for this subject matter. See also AS 46.40.040.

DNR also removed the siting criteria where industrial traffic is minimized through potential population centers because the traffic standards are more properly applied through local zoning, ordinances, and other Title 29 authority.

DNR found the term, "major energy facility" in 6 AAC 80.900(12), vague and unwieldy, and as too limiting with its requirement that all listed items be "facilities" could conceivably exclude some exploration-type activities. In response to confusion over the definition of the term, that definition was amended to address the concern that only "facilities" were covered. The definition removed the "facility" requirement, instead concentrating the type of proposed development, which would broaden the scope to exploration activities. Also natural gas pipelines and rights-of-way, natural gas treatment and processing facilities, and infrastructure related to natural gas treatment and processing facilities were added into the list of types of development covered by the standard.

The state's ability to comment on OCS oil and gas development has not changed as a result of these regulations. The original language is from the consistency review regulations in 6 AAC 50 adopted in February 2003 and approved by OCRM. The geographical scope of the ACMP in that previous regulation and 11 AAC 110.010(c) includes federal lands and the OCS. Indeed, HB 191 specifically addresses OCS reviews in the context of DEC standards in AS 46.40.040(b)(2). Also, AS 46.40.210's definition of state coastal zone explicitly includes federal lands and OCS. With respect to the 90-day deadline for consistency reviews, this timeline is suspended upon the request of the applicant (11 AAC 110.265(b)(2)), so in the case of federal agency reviews, the six-month federal extension could be used if needed by the state and federal agency to complete a consistency review. Consequently, the concern is misplaced.

Subsection 10.4.7: Utility Routes and Facilities (11 AAC 112.240)

The title of this section underwent revisions. Originally titled, "Utilities and Roads," DNR felt that the standard was confusing in that it combined into one standard two very disparate concepts: utility corridors and transportation routes. Moreover, by only using the term "roads" in the original standard, DNR felt that the standard failed to adequately capture all of the uses and activities meant to be regulated by this standard.

Therefore, the standard was separated into two standards in order to more directly and clearly address these uses. The title of 11 AAC 112.240 was changed to "Utility Routes and Facilities," to address the utilities prong, and a new section was added at 11 AAC 112.280, "Transportation Routes and Facilities," to address the transportation prong.

Subsection 10.4.8: Timber Harvest and Processing (11 AAC 112.250)

No substantial changes were made to this section. AS 41.17 (Forest Resources and Practices Act) and the regulations and procedures adopted under that chapter with respect to the harvest and processing of timber are incorporated into the ACMP and constitute the components of the program with respect to those purposes.

Subsection 10.4.9: Sand and gravel Extraction (11 AAC 112.260)

DNR changed this standard from what was formerly titled "Mining and Mineral Processing." The title of this section now more accurately identifies the substance of the standard.

By changing the title of this standard, DNR is not saying that mining is regulatorily removed, like how DEC's air, land and water quality standards are the exclusive standards of the ACMP for those purposes. AS 46.04.040(b). Rather, the standard was changed to reflect the fact that the former regulation simply repeated the substantial mining regulations already in place (e.g., suction dredging in a waterbody designated as important for the spawning, rearing, or migration of anadromous fish is required to obtain a Recreational Suction Dredge Permit from the DNR Office of Habitat Management & Permitting; EPA regulates the use of suction dredges in mining activities; the Army Corps of Engineers regulates use of suction dredges on navigable waters, etc.).

Thus, to comply with the HB 191 legislative mandate to eliminate "duplication or restatement of other state or federal requirements," the mining standard was deleted. Notwithstanding, mining-related activities may be addressed through other standards, such as utility routes and facilities, transportation routes and facilities, energy facilities, or subsistence, and district enforceable policies approved under 11 AAC 114.

Subsection 10.4.10: Subsistence (11 AAC 112.270)

Few issues generate as much emotion and attention as the issue of subsistence in Alaska. The amended regulations most substantially achieved two

results: (1) removal of the former 6 AAC 80.110(a) language requiring districts and state agencies to "recognize and assure opportunities for subsistence usage of coastal areas and resources," and (2) removal of the language of 6 AAC 80.110(c) allowing districts to designate subsistence areas where subsistence is the dominant use of coastal resources and "in which subsistence uses and activities have priority over all nonsubsistence uses and activities."

DNR always has recognized, and continues to recognize, subsistence as a critically important use of coastal resources, and continues to strive toward the goal of assuring subsistence use of the coastal resources. The importance of subsistence was enunciated in the 1979 FEIS: "The subsistence lifestyle … is a unique cultural aspect of Alaska. Practiced by Natives and non-Native alike, subsistence competes with other uses of coastal resources. Protecting subsistence is one of the most important coastal issues." ACMP FEIS, p. 35. DNR recognizes the magnitude and consequence of regulations addressing this issue so fundamental to Alaska and Alaskans.

However, the former regulatory "standard" of "assuring opportunities for subsistence usage of coastal areas and resources" was never envisioned by the legislature when the ACMP was enacted:

> The Council felt that resolution of all subsistence issues was beyond the scope of ACMP and the standard was restricted to declaring that subsistence should generally be recognized and protected, that districts are obligated to identify areas of importance to subsistence, and that they then have the option of designating and managing such areas for the benefit of subsistence users. ACMP FEIS, p. 69.

DNR views the amended subsistence standard as a means to put teeth behind a formerly ineffectual standard. The former regulatory "standard" of "assuring opportunities for subsistence usage of coastal areas and resources" was simply poor regulatory language. While the former subsistence mandate may sound powerful, a requirement to "assure opportunities" for subsistence language provides no meaningful, enforceable standard. No project reviewer can "assure opportunities for subsistence usage of coastal areas and resources."

What DNR can do, however, is mandate that projects avoid impacts altogether to subsistence uses of coastal resources. Or, where complete avoidance of adverse impacts is proven by the applicant to be impracticable, project reviewers can require that the adverse impacts to the subsistence uses of coastal resources be minimized. Unlike the former standard, the draft standard is a workable, useable standard, and that is how the regulations were redrafted.

The public should note that the "mitigation" prong (discussed below) is not included in the subsistence standard's avoid or minimize sequencing process. That is because DNR recognizes how subsistence is deemed so important to Alaska, and its peoples dependent on subsistence, that avoidance or minimization are the only options. If adverse impacts to subsistence uses of coastal resources cannot be avoided altogether or minimized, then no amount of "mitigation" will be allowed, and the development will not be found consistent with the ACMP.

As to the concern over removal of language establishing a statewide priority of subsistence uses and activities over all nonsubsistence uses and activities, the legislature never intended the state to establish policies better determined by the coastal districts:

> The Alaska Coastal Management Program has been designed to encourage the maximum amount of problem resolution at the local level." The FEIS states, "Local governments, aside from being closest to the coastal problems, are also most familiar with local conditions and have the traditional political right and responsibility to govern general land use…. With this in mind, the legislature called on local governments to prepare programs to govern the use of coastal resources in their areas. ACMP FEIS, p. 38.

For DNR to establish a statewide subsistence priority not only violates the spirit of the legislation, but fails to pay proper deference to the persons "most familiar with local conditions and [who] have the traditional political right and responsibility to govern general land use." While one district may feel that subsistence indeed deserves a priority designation, other districts may not. A statewide subsistence priority would impose the will of some districts on other districts. This is inappropriate and contradictory to the intent of the ACMP. Rather, the designation should be in the hands of the districts. Districts have the right and responsibility to establish enforceable policies, including designation of a subsistence priority, as long as that policy is a "matter of local concern" as defined and described in AS 46.40.070 and does not arbitrarily or unreasonably restrict or excludes uses of state concern.

Subsection 10.4.11: Transportation Routes/Facilities (11 AAC 112.280)

As discussed above, this is a new section. The section was added to separate the entire activity of transportation projects from the confusing use of the word "roads" in the former "Utilities and Roads" standard. With this new standard, it is clear that all transportation routes and facilities must avoid, minimize, or mitigate alterations in surface and ground water drainage patterns, disruption in known or

reasonably foreseeable wildlife transit and blockage of existing or traditional access. "Transportation routes and facilities" is defined at 11 AAC 112.990(28) as to include "natural transportation routes dictated by geography or oceanography, roads, highways, railways, air terminals, and facilities required to operate and maintain the route or facility."

Subsection 10.4.12: Habitats (11 AAC 112.300)

As with amendments to other portions of the regulations, amendments to the habitats section involved a painstaking process on the part of DNR to balance the competing interest in, use of, protection of, and maintenance of coastal habitat resources. The issues raised in the amendments to this section, however, involved a great many issues. Explanation of the issues that cannot be gleaned from a lay reading of the regulations, or those issues that were controversial, will be discussed in sequence.

Subsection 10.4.12.1: Removal of "Maintain or Enhance" Standard

The habitats section at 6 AAC 80.130 formerly required that habitats listed be managed so as to "maintain or enhance the biological, physical, and chemical characteristics of the habitat…." DNR carefully reviewed this issue and determined that requiring that habitats be managed so as to "maintain or enhance the biological, physical, and chemical characteristics of the habitat…" was vague and unrealistic in striking a proper balance between environmental stewardship and responsible development. DNR determined that few (if any) projects could meet the literal test articulated in 80.130, since the most non-invasive project (in fact, even just one person treading on the ground at the proposed site) would have some impact. Even that *de minimus* impact would violate the "maintain or enhance" standard.

Due to the impossibility of meeting the idyllic – and therefore ineffective – "maintain or enhance" standard, ACMP project reviewers had in the past simply defaulted to subsection 6 AAC 80.130(d), that allowed non-conforming uses if the use satisfied the following three-pronged test: significant public need, no feasible prudent alternative, and having taken "all feasible and prudent steps to maximize conformance with the standards." "Feasible and prudent" was defined as "consistent with sound engineering practice and not causing environmental, social, or economic problems that outweigh the public benefit to be derived from compliance with the standard.…" In other words, the non-conforming uses test simply became the standard, since the "maintain or enhance" standard was unrealistically stringent. This regulatory imprecision required amendment.

DNR recognized that removal of the "maintain or enhance" standard could be perceived as a shift away from pursuing the goal of zero impacts. But as a standard, the former articulation of this goal was not clear, and contained no level of predictability as to how the test was to be applied. This was the reason that the regulations moved to the more traditional approach of "avoid, minimize, or mitigate" adverse impacts, where practicable (discussed in detail, below).

Thus, the draft regulations retained the goal of no impacts by formulating the standard requiring complete avoidance of impacts to the resources when practicable. But the regulations set out a detailed and practical sequencing process in a discreet regulatory article to best implement that goal.

Subsection 10.4.12.2: Removal of "Upland"

DNR removed the term "upland" in 11 AAC 112.300(a)(8) from "important habitat." DNR decided to remove the "upland" qualifier in "important habitat" for many of the same reasons articulated in the discussion above regarding the decision to amend the definition of "coastal waters" to include a salinity requirement, and to limit applicability of many statewide standards to have a direct and significant impact on coastal waters.

While that lengthy discussion will not be repeated here, recall that the FEIS description of the "inland boundaries" of the program, as "those areas the management of which is necessary now or is likely to be necessary in the near future to control uses which have a direct and significant impact on coastal waters,…" Recall as well that the boundaries definition includes "special management areas, transitional and intertidal areas, salt marshes and wetlands, islands, and beaches." ACMP FEIS, p. 109. This definition emphasizes the point that the ACMP regulations were, and are, intended to provide a management structure of Alaska's coastal zone, not the state's upland habitats. Again, regulation of these zones can and should be the subject of a statewide habitat regulation, not the ACMP.

In fact, the removal of the word "upland" is less of a change than many may realize. Critics of the deletion will note that in 6 AAC 80.130(a), "important upland habitats" is listed as one of the eight habitats "subject to the Alaska coastal management program." Yet, while subsection (c) described how habitats (1) through (7) were to be managed, there is no management standard, or even definition, of "important upland habitat." There is, however, a definition of "upland" in the definitions section of the chapter, at 6 AAC 80.900(16): "'Upland' means drainages, aquifers, and land, the uses of which would have a direct and significant impact on coastal water" (emphasis added).

So correctly applied, the former regulations would have regulated only upland uses and impacts that bore directly and significantly on coastal waters. For those districts, resource agencies, and project reviewers that had allegedly relied on the former "important upland habitat" standard to protect inland flora and fauna, it is debatable whether that use of the standard was appropriate. DNR's decision to remove the "upland" qualifier therefore clarifies an otherwise highly problematic and ambiguous standard.

Notwithstanding, the public should note that districts still may designate "important habitats" in the uplands. As amended, an "important habitat" is a portion or portions of those seven habitats listed in 11 AAC 112.300(c), that are either designated as an important habitat by DNR or the district under 11 AAC 114.250(h), or identified as state game refuges, state game sanctuaries, state range areas, or fish and game critical habitat areas under AS 16.20. So if a portion of a river, for example, has a direct and significant impact on coastal water and can be shown to be significantly more productive than adjacent habitat, then that habitat can be designated as "important habitat" by the district – even if that portion of the river is significantly upland.

Subsection 10.4.12.3: Riparian Management Areas

DNR devised the standard for protection of natural vegetation within riparian areas of rivers, streams and lakes under the habitats standard. This area is defined at 11 AAC 112.300(c)(2) in terms of the distances, measured from the outermost extent of the ordinary high water, on either side of the waterbody, depending upon the type of waterbody. DNR believes that these standards will greatly improve the efficiency and effectiveness of the standard as well as delineating the areas based on sound science.

Subsection 10.4.12.4: Definition of "floodplain".

DNR added a definition for the term "active floodplain" in the rivers, streams, and lakes standard. That definition is "the low land and relatively flat areas adjoining rivers, lakes, and streams that are subject to regular inundation by floods." 11 AAC 112.990(1).

Subsection 10.4.13: Historic, Prehistoric, and Archaeological Resources (11 AAC 112.320)

DNR amended the Historic, Prehistoric, and Archaeological Resources standard at 6 AAC 80.150 to include the standard at 11 AAC 112.320. This

amended standard requires appropriate state agencies to designate areas of the coast that are important to the "important to the study, understanding, or illustration of national, state, or local history or prehistory."

Subsection 10.4.14: Avoidance, Minimization, and Mitigation (11 AAC 112.900)

A modified standard appears throughout the draft regulations, imposing a requirement upon applicants to "avoid, minimize, or mitigate" adverse impacts to a given use or resource. The standard appears in the utilities and roads section at 11 AAC 112.240, the transportation routes and facilities section at 11 AAC 112.280, and throughout the habitats sections at 11 AAC 112.300.

Before discussing the standard, "Sequencing process to avoid, minimize, or mitigate," at 11 AAC 112.900, a discussion on the evolution of the current formulation is necessary. The "avoid, minimize, or mitigate" concept was originally introduced in the ACMP when draft regulations were released for review and discussion at the coastal conference on February 12, 2004, in the definitions section at 11 AAC 112.990(1):

> avoid, minimize, or mitigate means a process that involves avoidance of impacts where practicable, minimization of impacts where avoidance is not practicable, and compensating for impacts to the extent appropriate and practicable.

Initially, the inclusion of a definition of this term that appeared in several sections of the statewide standards seemed to be adequate. However, DNR later determined that a more concrete system for the previously undefined term "mitigation" was required. DNR felt that the standard in this terse definition format violated the dictate in HB191 to provide standards that are "clear and concise and provide needed predictability as to the applicability, scope, and timing of the consistency review process." Proposing a process that "involves" factors without even defining what those factors mean was viewed by DNR as impermissibly vague and unpredictable.

The standard was thus expanded, clarified, and moved into its own "stand-alone" section in the "General Provisions" section of Chapter 112. However, upon close scrutiny, DNR determined that this new standard, while considerably clearer and more comprehensive than its predecessor, still contained six problems.

First, the standard could be read as requiring a no net loss of coastal resources. The process of "avoid, minimize and mitigate" originated from the

Army Corps of Engineers' 1990 wetlands regulations, which were developed in pursuit of a "no net loss" of wetlands policy ("[I]t remains a goal of the Section 404 regulatory program to contribute to the national goal of no overall net loss of the nation's remaining wetlands base." See EPA/Army MOA, 55 Fed. Reg. 9210, 9211-12 (Mar. 12, 1990). EPA's wetlands regulatory guidelines suggested that the sequencing policy implements the overall goal of the 404 program to achieve "no net loss" of wetlands. But unlike the Section 404 regulatory program, the ACMP cannot be viewed as a "no net loss" program. Rather, it is a management statute designed to coordinate consistency reviews by DNR or the coordinating agency, with a goal of involving those with expertise and stakeholders to establish consistency only when applicable standards are met. The ACMP FEIS demonstrates that a no net loss of coastal resource requirement never envisioned at the inception and approval of the program: "…complete nondegradation is an impossible standard to meet, and [] in certain instances tradeoffs between natural values and other human values will have to be made …." (ACMP FEIS, "Policies Objectives and Standards of the Program," p. 76). Congress in enacting the CZMA has similarly recognized these tradeoffs in managing coastal resources and development. See16 U.S.C. §1451(a),(f),(j); 1452(2), (2)(D); 1455(d)(2)(H). Therefore, DNR determined to make the standard explicit that "no net loss" could not be <u>required</u>. This is not to say that projects cannot be implemented with a resultant no net loss of coastal resources – this result could and should occur when the project is taken through the first step of the sequencing process, to completely <u>avoid</u> impacts. In fact, the vast majority of projects will go no further in the analysis than this: if the project does not <u>completely avoid adverse impacts</u> to coastal resources, then the project will not be allowed. However, some projects, when measured against the "practicability" test, will be authorized to move to the "minimization" analysis, and then, a rare few projects may even make a sufficient showing of impracticability to allow it to get to "mitigation."

Second, the standard's use of the term "compensatory mitigation" implied that the applicant could potentially be required to pay money as a penalty in order to move forward with a project that had unavoidable and unminimizeable impacts to coastal resources after a practicability analysis. This concept of payment of money, commonly referred to as a "fee in lieu of" impacted resources approach, was never intended by the ACMP, and is not intended by DNR at present. A review of the previous iteration of the mitigation sequencing process confirms this: the "compensatory mitigation" process consisted of (1) restoring impacted coastal resources on-site to the extent practicable, (2) replacing an appropriate amount of impacted coastal resources on-site, if practicable; (3) replacing an appropriate amount of impacted coastal resources off-site, in areas adjacent or contiguous to the development site, if practicable, and (4) substituting an unavoidably impacted coastal resource with an improvement to coastal resources elsewhere, if practicable.

Payment of money was never implied in that process. DNR therefore clarified the current standard to remove the confusing term "compensatory," and to make clear that "mitigation" did not involve a "fee in lieu of" impacted resources approach.

Third, the previous formulation of the sequence allowed for a potentially inequitable process whereby the applicant could be subject to multiple mitigation sequencing processes from the coordinating agency during a consistency review, and federal permitting authorities. However, DNR wanted to ensure that whatever the federal authorization required by way of mitigation sufficed under the ACMP: the section had to ensure that the ACMP consistency review coordinator had a seat at the table of the federal mitigation process to ensure that the mitigation was adequate under the ACMP. Therefore, DNR added a section requiring that, when a project required a federal authorization identified under 11 AAC 110.400, the coordinating agency must consult with the authorizing federal agency to determine whether the mitigation requirements proposed by the federal agency for that federal authorization would satisfy the ACMP mitigation requirements. If the coordinating agency determined that the mitigation requirements proposed by the federal agency would not satisfy ACMP mitigation requirements, the coordinating agency shall require appropriate mitigation.

Fourth, the terms "restore" and "replace" impacted coastal resources were replaced with the term "rehabilitate." This was done primarily to address the large project scenario, where restoration is not a realistic goal, but rehabilitation is. For example, a mine with a 30-year life can never restore the resources, and to "replace" a like amount of resources is virtually impossible as well. However, the mine can be "rehabilitated" to pristine conditions. Or, if it cannot be rehabilitated on-site, then the regulations allow for a plan whereby the applicant must substitute rehabilitation of, or improve, other coastal resources, either on-site or off-site. Thus, rather than providing an unworkable and unrealistic standard, the "rehabilitation" standard ensures that, at the close of the project's life, the disturbed conditions will be allowed to recuperate such that it retains environmental value, or that rehabilitation/improvements will occur elsewhere.

Fifth, DNR set forth a requirement that the rehabilitation of project impacts be established by the coordinating agency at the time of the project's consistency review, in order that project participants and the affected public would be able to knowledgeably and meaningfully participate in the project review process.

Sixth, previous language vaguely required applicants to avoid and minimize impacts "to the extent practicable." DNR felt that this formulation could potentially have allowed avoidance and minimization to be satisfied by mere token efforts on behalf of the project applicant. Thus, to foreclose that argument by an applicant

seeking to perform the least avoidance or minimization possible, DNR added the requirement that the avoidance and minimization occur "to the maximum extent practicable."

This analysis will briefly address the need for the revised standard in the first place. The "avoid, minimize, or mitigate" standard is a stringent one – arguably more than what preexisted it ("the maintain or enhance" standard, as discussed below). Applicants must attempt, first and foremost, to avoid adverse impacts – any adverse impacts -- altogether. Only where avoiding the impacts to the maximum extent practicable may the applicant attempt to then "minimize" the adverse impacts. Then, only if minimization of adverse impacts to the maximum extent practicable may the applicant proceed to at least having to "mitigate" the damages through an articulated and stringent scheme of mitigation requirements. Preservation-minded stakeholders should take comfort in the fact that inclusion of a mitigation prong in the analysis adds a potential layer of environmental protection never contained in the former regulations: a potential requirement to rehabilitate impacted resources, or even improve a different site, rather than simply impact them as minimally as possible.

Using an "or" connector rather than an "and" connector in the standard does not weaken the applicable standard by "lower[ing] coastal protections to the lowest common denominator of mitigation." One commentor illustrated a criticism of the new standard, stating, "If this standard were applied to traffic laws, it would be legal to drive 120 mph, provided you hit the brakes at least once." DNR felt that the Corps' standard, "avoid, minimize and mitigate," was illogical and created confusion. A project cannot avoid and minimize impacts to a particular resource; the applicant can attempt to comply with one or the other but not both. The logical regulatory formulation of the test is that the applicant must avoid, minimize or mitigate.[14]

Moreover, the "or" connector does not weaken the standard to the lowest common denominator. As explained above, an applicant may not simply skip avoiding and minimizing adverse impacts and jump straight to mitigation. The applicant must avoid adverse impacts to the maximum extent practicable. In many cases, that will be the end of the analysis: it will be practicable to avoid the impacts, and even though the avoidance alternative may be more expensive, the applicant will be required to take that alternative to obtain a consistency determination. Though the traffic analogy is far afield, correct application of it would be that a

[14] Incidentally, DNR did not invent the phrase, "avoid, minimize, or mitigate." For example, the Historic Preservation Act regulations similarly require agency and project participants to consult in order to "avoid, mitigate or mitigate adverse impacts on historic properties." 36 C.F.R. 800.6(a).

person may not drive 120 mph, or even 1 mph above the speed limit, unless he could show driving at the speed limit were not practicable (which would be very difficult in other than an exigent situation). Nor does reference to "hitting the brakes at least once" adequately represent the compensatory mitigation requirement. Nominal or merely symbolic mitigation is not acceptable. Rather, the standard has been written to require an in-depth sequencing analysis.

Section 10.5: Description of the Regulatory Changes to 11 AAC 114

This amendment package includes a mark up version of the regulations that identify the specific changes made to the three chapters of ACMP regulations, avaialble on line at www.alaskacoast.state.ak.us.

This section primarily addresses: (1) the requirements for district plan contents and 2) the transition amendment process established at 11 AAC 114.345 for district plans which are amended per HB 191. The following district planning guidance can be found at www.alaskacoast.state.ak.us: (a) an enforceable policy table that explains the applicability of each ACMP Standard (11 AAC 112) and Subject Use (11 AAC 114.250) and whether or not a coastal district may write enforceable policies or designate areas; (b) mapping guidance for coastal districts prepared by DNR and the Department of Commerce, Community and Economic Development; and (c) a graphic representation of the transition plan amendment process.

For purposes of a coastal district preparing a plan revision under 11 AAC 114, the standards at 11 AAC 112 and the district plan requirements at 11 AAC 114 should be used. In other words, even though the statewide standards at 11 AAC 112.200 – 11 AAC 112.990 will not yet be applicable, the districts should write their revised district plans, which are due July 1, 2005, as if they were.

Existing district plans and enforceable policies that were approved by the Coastal Policy Council (CPC) remain in effect until July 1, 2006, unless DNR reviews and approves new enforceable policies prior to that date. While the district coastal management plans must be revised to comply with HB 191, AS 46.40 and the implementing regulations, the district may do the minimum necessary to accomplish that task. For example, the coastal district could elect to delete all enforceable policies that do not comply with the law, and include only one enforceable policy as the sole enforceable component of their coastal management plan. Appropriate revisions to the resource inventory and analysis and any necessary maps or narrative descriptions to support the enforceable policy (see 11 AAC 114.250-270) must be included. Alternatively, a coastal district may decide to do a comprehensive revision, to include several new or revised enforceable policies,

with commensurate updates to the resource inventory and analysis and maps or narrative descriptions to support designated areas. The choice is up to each coastal district, dependant on the resources (time and money) each chooses to commit or OPMP is able to provide.

Subsection 10.5.1: Government Process (11 AAC 114.010-020)

This article was not substantially revised. The revisions are technical, to reflect the relocation of the ACMP into DNR under OPMP, and the deletion of the CPC. DNR assumes the responsibilities of the former CPC. Regarding the description of public participation, see Chapter 1.

Subsection 10.5.2: Issues, goals, and objectives (11 AAC 114.200)

> ***11 AAC 114.200. Issues, goals, and objectives.*** *A district plan must include the district's overall coastal management issues, goals, and objectives or summarize or reference the district's overall coastal management issues, goals, and objectives contained in the district's comprehensive land and resource use plan. The means used to achieve an objective must be stated in the district plan. (Eff. 7/1/2004, Register 170)*
>
Authority:	*AS 46.39.010*	*AS 46.39.040*	*AS 46.40.040*
	AS 46.39.030	*AS 46.40.030*	

This section was not substantially revised.

Subsection 10.5.3: Organization (11 AAC 114.210)

> ***11 AAC 114.210. Organization.*** *(a) A district plan must describe the organizational structure of the district and state whether the district is a coastal resource service area or a municipality.*
>
> *(b) A district plan must identify and give addresses for the officials or departments within the district that are assigned to*
>
> *(1) determine, for the purposes of issuing a municipal authorization or permit, the consistency of proposed uses and activities with the approved district plan;*
>
> *(2) submit comments to the state under 11 AAC 110. (Eff. 7/1/2004, Register 170)*
>
Authority:	*AS 46.39.010*	*AS 46.39.040*	*AS 46.40.040*
	AS 46.39.030	*AS 46.40.030*	

This section was not substantially revised.

Subsection 10.5.4: Coastal Zone Boundaries (11 AAC 114.220)

> ***11 AAC 114.220. Coastal zone boundaries.*** *(a) A district plan must include, in a manner sufficient for district plan development and implementation, a map and description of the boundaries of the coastal zone subject to the district plan. The boundaries must be within or coterminous with the district and must include those lands that would reasonably be included in the coastal zone and subject to the district plan if those lands were not subject to the exclusive jurisdiction of the federal government.*

(b) Initial coastal zone boundaries must be based on Biophysical Boundaries for Alaska's Coastal Zone, developed by the Department of Fish and Game under contract to the former Division of Policy, Development and Planning, Office of the Governor (1978, reprinted January 1985) and must include the zone of direct interaction and the zone of direct influence. The Biophysical Boundaries for Alaska's Coastal Zone (1978), reprinted January 1985, is adopted by reference.

(c) Final coastal zone boundaries may diverge from the initial boundaries so long as the final boundaries

(1) extend inland and seaward to the extent necessary to manage a use or an activity that has or is likely to have a direct and significant impact on coastal waters; and

(2) include the following areas within the district, if present:

(A) transitional and intertidal areas, salt marshes, saltwater wetlands, islands, and beaches; and

(B) areas that are likely to be affected by or vulnerable to sea level rise.

(d) If the criteria in (c) of this section are met, final coastal zone boundaries may be based on local government boundaries, cultural features, planning areas, watersheds, topographic features, uniform setbacks, or the dependency of uses and activities on water access.

(e) The coastal zone boundaries of a district must be sufficiently compatible with those of an adjoining coastal zone to allow consistent administration of the program.

(f) Notwithstanding any other provision of this section, coastal zone boundaries approved by the former Coastal Policy Council under former 6 AAC 85.040 and 6 AAC 85.150 and the United States Department of Commerce under former 6 AAC 85.175 and in effect on July 1, 2004 remain in effect. (Eff. 7/1/2004, Register 170)

Authority: AS 46.39.010 AS 46.39.040 AS 46.40.040
AS 46.39.030 AS 46.40.030

***Editor's note:** The Biophysical Boundaries for Alaska's Coastal Zone, (1978, reprinted January 1985), adopted by reference in 11 AAC 114.220 is available for inspection at the Department of Natural Resources, Office of Project Management and Permitting, 302 Gold Street, Suite 202, Juneau, AK 99801.*

The principle change to this section is at 11 AAC 114.220(c) – "… final coastal zone boundaries may diverge from the initial boundaries so long as the final boundaries (1) extend inland and seaward to the extent necessary to manage a use or an activity that has or is likely to have a direct and significant impact on coastal waters;…" The term "'Coastal water' was revised and means those waters, adjacent to the shorelines, that contain a measurable quantity or percentage of sea water, including sounds, bays, lagoons, ponds, estuaries and tidally influenced waters." 11 AAC 112.990(6). See discussion of underlying rationale at Section 10.4.1.

Per 11 AAC 114.220(f), all existing coastal district boundaries are "grandfathered": "Notwithstanding any other provisions of this section, coastal zone boundaries approved by the former Coastal Policy Council under former 6 AAC 85.040 and 6 AAC 85.150 and the United States Department of Commerce under former 6 AAC 85.175 in effect on [the effective date of this chapter] remain in effect."

Of course if a new district forms, or a district wishes to change its existing boundaries, then the "direct and significant impact on coastal waters" requirement

in 11 AAC 114.220(c) does apply. If a district annexes additional lands, then the requirement at 11 AAC 114.220 (c) applies to the annexed area. The existing coastal district boundaries within the original municipal boundary would still be "grandfathered."

The amended regulations also limit the application of many standards and enforceable policies to seawater areas. Throughout the regulations, the application of particular standards has been limited to "coastal waters," or waters "having a direct and significant impact on coastal waters." These sections include the following: coastal access at 11 AAC 112.220, sand and gravel extraction at 11 AAC 112.260, important habitats definition at 11 AAC 112.300(c), rivers, streams, and lakes definition at 11 AAC 112.990(23), wetlands definition at 11 AAC 112.990(25) and (33), and coastal zone boundaries at 11 AAC 114.220.

Subsection 10.5.5: Resource Inventory and Resource Analysis (11 AAC 114.230 - .240)

11 AAC 114.230. Resource inventory. *(a) Resources subject to a district plan are limited to those resources*

(1) subject to the uses and activities described in 11 AAC 112.200 – 11 AAC 112.240 and 11 AAC 112.260 – 11 AAC 112.280; and

(2) proposed for designation under 11 AAC 114.250(b) - (i).

(b) For the resources within the district's coastal zone, a district plan must include a resource inventory that describes, as necessary to complete the resource analysis under 11 AAC 114.240 and in a manner sufficient for plan development and implementation,

(1) natural resources such as forests, minerals, soils, wetlands, water, fish and wildlife, and those habitats listed in 11 AAC 112.300, including those important habitats proposed for designation under 11 AAC 114.250(h), if appropriate;

(2) major cultural, historic, prehistoric, and archeological resources;

(3) recreational resources; and

(4) coastal resources important to subsistence uses.

(c) A district plan must describe or map, in a manner sufficient for plan development and implementation,

(1) major land or water uses or activities that are or have been conducted or designated within or adjacent to the district; and

(2) major land and resource ownership, jurisdiction, and management responsibilities within or adjacent to the district.

(d) A district plan may incorporate appropriate and pertinent local knowledge into the resource inventory.

(e) Information in the resource inventory must be substantiated or documented with a citation or reference to the source of that information.

(f) If inventory information is contained in another published source, the relevant information must be summarized, referenced in the district plan, and made available upon request. (Eff. 7/1/2004, Register 170; am 10/29/2004, Register 172)

Authority: AS 46.39.010 AS 46.39.040 AS 46.40.040
AS 46.39.030 AS 46.40.03

11 AAC 114.240. Resource analysis. *(a) A district plan must include an analysis of the impacts of uses and activities identified under 11 AAC 114.250 on the important habitats and resources*

identified under 11 AAC 114.230(b) within the district's coastal zone boundaries. The analysis must describe, in a manner sufficient for district plan development and implementation,

(1) the present and reasonably foreseeable needs, demands, and competing uses for coastal zone habitats and resources;

(2) the reasonably foreseeable direct and indirect impacts of uses and activities;

(3) the suitability of habitats, natural hazard areas, and resources for development;

(4) the sensitivity of habitats, natural hazard areas, and resources to development; and

(5) potentially or reasonably foreseeable conflicts among coastal zone uses and activities.

(b) A district may incorporate appropriate and pertinent local knowledge into the resource analysis required by this section.

(c) A district must document by local usage or scientific evidence a use or resource of unique concern that is the subject of an enforceable policy under 11 AAC 114.270(g). (Eff. 7/1/2004, Register 170)

Authority: AS 46.39.010 AS 46.39.040 AS 46.40.040
AS 46.39.030 AS 46.40.00

This section was revised to comport with the significant changes to the state standards and sections regarding subject uses and district enforceable policies. The resource inventory and analysis must substantiate the district enforceable polices written under allowable subject uses and in particular, support the designated areas. Specific terms used in the resource inventory and resource analysis sections are described as follows.

Subsection 10.5.5.1: Local Knowledge

One important change was to the definition of "local knowledge" defined at 11 AAC 114.990(22): "local knowledge" means a body of knowledge or information about the coastal environment or the human use of that environment, including information passed down through generations, if that information is (A) derived from experience and observations; and (B) generally accepted by the local community."

The original district plan criteria in 6 AAC 85.050 and 6 AAC 85.990 provided that local knowledge should be included in the district's resource inventory and analysis. The revised regulations at 11 AAC 114.230-240 retain the role of local knowledge in the development of the district resource inventory. Local knowledge can be a component of data that goes into a scientific analysis that subsequently is used as scientific evidence, but local knowledge alone does not constitute "scientific evidence" under AS 46.40.070 and the regulatory definition at 11 AAC 114.990(40).

The concept of "local usage" first appears at 11 AAC 114.240, in the discussion of a district's resource analysis. "A district must document by local

usage or scientific evidence a use or resource issues of unique concern that are the subject of an enforceable policy under 11 AAC 114.270(g).” 11 AAC 114.240(c). Thus, an allowable enforceable policy must document its uses or resource issues of unique concern “by local usage or scientific evidence.”

Subsection 10.5.5.2: Matter of Local Concern

11 AAC 114.270(h) restates and clarifies in regulatory form the main points of the AS 46.40.070(a)(2)(C) “matter of local concern test”[15]:

> In reviewing and approving a district enforceable policy developed under this chapter that addresses a matter of local concern as defined in AS 46.40.070(a)(2)(C), the commissioner must find that (1) the coastal use or resource… (B) has been demonstrated as sensitive to development in the resource analysis developed under 11 AAC 114.240(a); (C) is not adequately addressed by state or federal law…; and (D) is of unique concern to the coastal resource district as demonstrated by local usage or scientific evidence that has been documented in a resource analysis under 11 AAC 114.240(c)….

Subsection 10.5.5.3: “Local Usage”

“Local usage” is defined as: “current and actual use of a coastal resource by residents of the locality in which the resource is found.” 11 AAC 114.990(23). This definition would require proof, but not of the rigorous nature entailed by having to provide “scientific evidence” of the use.

Subsection 10.5.5.4: “Appropriate and pertinent”

The districts’ ability to “incorporate appropriate and pertinent local knowledge into the resource inventory” from 11 AAC 114.230(c) is part of the “information” referred to in 11 AAC 114.230(d) that “must be substantiated or documented with a citation or reference to the source of the knowledge.” The term “pertinent” limits the type and extent of local knowledge that could be cited in a district’s inventory. Obviously, local knowledge extends back thousands of years and covers limitless amounts of information and tradition. While that body of knowledge is central to the district’s development of a proper resource inventory, only the part of that body that is “appropriate and pertinent” to the inventory being

[15] Under the statutory “matter of local concern” test at AS 46.40.070(a)(2)(C), a district may establish an enforceable policy concerning a coastal use or resource as long as the district can demonstrate that the use or resource (1) is sensitive to development, (2) not adequately addressed by state or federal law, and (3) of unique concern to the coastal resource district.

developed is relevant and useful. The term therefore gives a standard for DNR and the public to use in determining the applicability and pertinence of local knowledge offered to support some proposition.

Subsection 10.5.5.5: Scientific Evidence

The definition of "scientific evidence" at 11 AAC 114.990(40) provides guidance for the test for "matters of local concern" and in other sections of the proposed regulations [important habitat designation language at 11 AAC 112.300(c) and 11AAC 114.250(h), definition of natural hazards at 11 AAC 112.990(15), resources analysis at 11 AAC 114.240(c), and district enforceable policies at 11 AAC 114.270(h)].

> Scientific evidence" means facts or data that are (A) premised upon established chemical, physical biological, or ecosystem management principles as obtained through scientific method and submitted to the office to furnish proof of a matter required under this chapter; (B) in a form that would allow resource agency review for scientific merit; and (C) supported by one or more of the following: i) written analysis based on field observation and professional judgment along with the photographic documentation; (ii) written analysis from a professional scientist with expertise in the specific discipline; or (iii) site-specific scientific research that may include peer-review level research or literature.

11 AAC 114.990(40).

Since the "scientific evidence" definition requires a relatively high burden of scientific documentation, it is foreseeable that many districts will elect to use the alternative of making the requisite showing through "local usage." Thus, the "local usage" concept is extremely important to a district, as it can form the very basis of a district enforceable policy.

Subsection 10.5.5.6: Reasonably Foreseeable

The term "reasonably foreseeable" spans all three chapters in various contexts. The term modifies such things such as: "reasonably foreseeable direct or indirect effect on a coastal use or resource" in 11 AAC 110.750 (activities generally subject to individual consistency review); the definition of the "C" List at 11 AAC 110.990(8); the definition of "cumulative impacts" at 11 AAC 110.990(19); "reasonably foreseeable wildlife transit" in utilities routes and facilities and roads at 11 AAC 112.240(b)(2); "reasonably foreseeable adverse impacts" in the subsistence

standard at 11 AAC 112.270; and "reasonably foreseeable needs, demands, and competing uses for coastal zone habitats and resources" in the resource analysis section at 11 AAC 114.240.

Application of the term is a very fact-specific analysis that a project reviewer or fact-finder will examine in each individual case. Moreover, the words themselves are common enough in the normal course of usage that few laws or standards at various levels of government using the term define it, including the federal consistency rules at 15 C.F.R. 930.

Subsection 10.5.6: Subject Uses, Activities, Resources, and Designations (11 AAC 114.250)

11 AAC 114.250. Subject uses, activities, and designations. *(a) A district plan must include a description of the land and water uses and activities that are subject to the district plan. The uses and activities subject to a district plan are limited to those included in 11 AAC 112.200 – 11 AAC 112.240, 11 AAC 112.260 – 11 AAC 112.280, and (b) - (i) of this section.*

(b) A district shall consider the likelihood of occurrence of natural hazards in the coastal area and may designate natural hazard areas.

(c) A district shall consider and may designate areas of recreational use. Criteria for designation of areas of recreational use are

(1) the area receives significant use by persons engaging in recreational pursuits; or

(2) the area has potential for recreational use because of physical, biological, or cultural features.

(d) A district shall consider and may designate areas of tourism use. Criteria for designation of areas of tourism use are the area receives or has the potential to receive significant use by the visitor industry using cruise ships, floatplanes, helicopters, buses, or other means of conveying groups of persons to and within the area.

(e) A district shall consider and may designate, in cooperation with the state, sites suitable for the development of major energy facilities.

(f) A district shall consider and may designate areas of the coast suitable for the location or development of facilities related to commercial fishing and seafood processing.

(g) Except in nonsubsistence areas as identified under AS 16.05.258, a district may, after consultation with appropriate state agencies, federally recognized Indian tribes, Native corporations, and other appropriate persons or groups, designate areas in which a subsistence use is an important use of coastal resources and designate such areas.

(h) A district shall consider and may designate portions of habitat areas listed in 11 AAC 112.300(a)(1) – (8) and other habitats in the coastal area as important habitat if

(1) the use of those designated portions have a direct and significant impact on coastal water; and

(2) the designated portions are shown by written scientific evidence to be significantly more productive than adjacent habitat.

(i) A district shall consider and may designate areas of the coast that are important to the study, understanding, or illustration of national, state, or local history or prehistory.

(j) Areas proposed for designation by a district under (b) – (i) of this section are subject to public review and comment under 11 AAC 114.300 – 11 AAC 114.330 or 11 AAC 114.345(a) - (j) before approval by the commissioner. (Eff. 7/1/2004, Register 170; am 10/29/2004, Register 172)

Authority: AS 46.39.010 AS 46.39.040 AS 46.40.040
AS 46.39.030 AS 46.40.030

Revisions to this section are substantial and partially define the subject matter under which district enforceable policies may be written and specifically list the subject matter and criteria for establishing designated areas. The following discussions explain the intent and application of this section.

Subsection 10.5.6.1: Designation of Areas and the Limits of District Enforceable Policies

This is an important issue requiring clear explanation of the breadth of authority for district plans, and the relationship between the provisions of 11 AAC 114.250 and 11 AAC 114.270.

A district may write district enforceable policies on any or all of the uses, activities, and resources listed in 11 AAC 112.200 - .240 (coastal development, natural hazard areas, coastal access, energy facilities, and utility routes/facilities), and .260 - .280 (sand and gravel extraction, subsistence, and transportation routes and facilities), as well as uses, activities, and resources in 11 AAC 114.250(b)- (i) (natural hazard areas, recreational use areas, areas of tourism use, major energy facility sites, commercial fishing/processing facility areas, subsistence areas, important habitat areas, and historical/prehistorical site areas). However, if a district wishes to write an enforceable policy on one of the eight areas listed in 11 AAC 114.250(b)- (i), that area must be designated.

This gets to another important issue: may a district create a policy for the *matter* identified in those subsections? A district can create an enforceable policy for a matter identified in those subsections because coastal development, natural hazard areas, coastal access, energy facilities, and utility routes/facilities, sand and gravel extraction, subsistence, and transportation routes and facilities are all matters about which district enforceable policies can be written. However, a district may not create a policy based on a designated area for application outside of that designated area. For example, a district may develop a recreation policy, but only for application to uses or activities that may be occurring within the boundaries of that designated area. That is because "recreation" is one of the specific uses, activities, and resources in 11 AAC 114.250(b)- (i). In order to have an enforceable policy on one of the 11 AAC 114.250(b)- (i) uses, the district must comply with 11 AAC 114.250(c) and designate a recreational use area per the criteria set forth in that section. If the district has properly designated a recreational use area, then the district may adopt an enforceable policy per 11 AAC 114.270:

> For an area designated under 11 AAC 114.250, … a district may adopt enforceable policies that will be used to determine whether a specific land or water use or activity will be allowed. An area subject to these policies must

be described or mapped at a scale sufficient to determine whether a use or activity is located within the area. A description or map developed under this subsection must be referenced in the applicable enforceable policy and is an enforceable component of the district plan. 11 AAC 114.270(h).

Thus, a district may write an enforceable policy for a matter identified in 11 AAC 114.250(b)-(i), but only if the district has duly designated that area under 11 AAC 114.250. A policy on recreation outside of an officially designated area would violate 11 AAC 114.270(h) and would not be allowed.

Designating areas also allows districts to set priorities. For example, areas designated for seafood processing does not preclude these activities from occurring elsewhere. But it does allow the district to establish that it is a priority use in an area and provide added protection from impacts from that use or from other uses that may impact that use. Again, there would need to be an enforceable component of the policy, not just a designation of the area.

Subsection 10.5.6.2: Applicability of District Enforceable Policies

Since 11 AAC 114.250 requires a designation of areas, policies developed for application within those designated areas can only address uses or activities occurring within those designated areas (11 AAC 114.270(a)(1)). Such policies cannot be applied to a project outside a designated area, even if the impacts are within the area. Justification for the designated area must be provided in the resource inventory and analysis. However, an area designated for important habitat is limited to the area that a district can demonstrate is significantly more productive than adjacent habitat.

Subsection 10.5.7 – Proper and Improper Uses and Activities (11 AAC 114.260)

> ***11 AAC 114.260. Proper and improper uses and activities.*** *A district plan must describe the uses and activities, including uses of state concern, that will be considered proper, and the uses and activities, including uses of state concern, that will be considered improper, within the district's coastal zone, including land and water use designations. This description must be based on the district's statement of issues, goals, and objectives under 11 AAC 114.200 and must be consistent with the statewide standards set out in 11 AAC 112. (Eff. 7/1/2004, Register 170)*
> *Authority:* *AS 46.39.010* *AS 46.39.030* *AS 46.39.040* *AS 46.40.030* *AS 46.40.040*

This section was not substantially revised. However, the revisions to 11 AAC 114.270 that allow district's to develop enforceable policies that will be used to determine whether a specific land or water use or activity will be allowed within

designated areas, Areas Which Merit Special Attention, and special area management plans, has placed greater importance on the substance of this section, and within a coastal district plan.

> For an area designated under 11 AAC 114.250,… a district may adopt enforceable policies that will be used to determine whether a specific land or water use or activity will be allowed. An area subject to these policies must be described or mapped at a scale sufficient to determine whether a use or activity is located within the area. A description or map developed under this subsection must be referenced in the applicable enforceable policy and is an enforceable component of the district plan.

11 AAC 114.270(g).

Further, 11 AAC 114.260 requires districts to describe the uses and activities that will be considered proper and that will be considered improper, including land and water use designations. 11 AAC 114.270(g) states that for an area designated by a district under 11 AAC 114.250(b)-(i), a district may adopt enforceable policies that will be used to determine whether a specific land or water use or activity will be allowed.

Subsection 10.5.8 – District Enforceable Policies (11 AAC 114.270)

> ***11 AAC 114.270. District enforceable policies.*** *(a) The enforceable policies of a district are legally binding and provide the basis for a determination of consistency with the district plan. A district plan may include only enforceable policies developed under AS 46.40.030, AS 46.40.040, and this chapter that will be applied to the subject uses, activities, and resources identified in the district plan under 11 AAC 114.230 and 11 AAC 114.250. District enforceable policies must*
>
> *(1) address only uses and activities identified in 11 AAC 112.200 - 11 AAC 112.240 and 11 AAC 112.260 - 11 AAC 112.280 and areas designated under 11 AAC 114.250(b) - (i); and*
>
> *(2) meet the requirements of this section.*
>
> *(b) A district plan must clearly identify each district enforceable policy. Except for a boundary map or description developed under (g) of this section, district enforceable policies must be located in a single section of the district plan.*
>
> *(c) Except as provided in (d) of this section, a district may not adopt enforceable policies that duplicate, restate, or incorporate by reference statutes or administrative regulations adopted by state or federal agencies, including 11 AAC 112.*
>
> *(d) Unless a district can demonstrate that a matter is of local concern as defined in AS 46.40.070(a)(2)(C), a district may not adopt, and the commissioner will not approve, an enforceable policy that addresses matters included in the statewide standards contained in 11 AAC 112.200 – 11 AAC 112.240 and 11 AAC 112.260 – 11 AAC 112.280.*
>
> *(e) A district enforceable policy must*
>
> *(1) be clear and concise as to the activities and persons affected by the policy and the requirements of the policy;*
>
> *(2) use precise, prescriptive, and enforceable language;*

(3) not address a matter regulated or authorized by state or federal law unless the enforceable policy relates to a matter of local concern as defined in AS 46.40.070(a)(2)(C); and

(4) not arbitrarily or unreasonably restrict or exclude uses of state concern.

(f) In accordance with AS 46.40.040(b), a district may not address a matter regulated by the Department of Environmental Conservation under to AS 46.03, AS 46.04, AS 46.09, and AS 46.14 and the regulations adopted under those statutes.

(g) For an area designated by a district under 11 AAC 114.250(b) - (i), for a special area management plan developed under 11 AAC 114.400, or for an area which merits special attention inside a district developed under 11 AAC 114.420, a district may adopt enforceable policies that will be used to determine whether a specific land or water use or activity will be allowed. An area subject to these policies must be described or mapped at a scale sufficient to determine whether a use or activity is located within the area. A description or map developed under this subsection must be referenced in the applicable enforceable policy and is an enforceable component of the district plan.

(h) In reviewing and approving a district enforceable policy developed under this chapter that addresses a matter of local concern defined in AS 46.40.070(a)(2)(C), the commissioner must find that

(1) the coastal use or resource

(A) is within a defined portion of the district's coastal zone that has been mapped or described under 11 AAC 114.230(c)(1);

(B) has been demonstrated as sensitive to development in the resource analysis developed under 11 AAC 114.240(a);

(C) is not adequately addressed by state or federal law, including consideration of comments by the appropriate state or federal agency in comments on the public hearing draft under 11 AAC.114.315 or during consultation under 11 AAC 114.340(c)(5); and

(D) is of unique concern to the coastal resource district as demonstrated by local usage or scientific evidence that has been documented in a resource analysis under 11 AAC 114.240(c); and

(2) the language and subject matter of the enforceable policies meets the requirements of (e) of this section.

(i) Notwithstanding any contrary provision of (e)(3) of this section, enforceable policies contained in a district plan approved by the former Coastal Policy Council under former 6 AAC 85.195 – 6 AAC 85.225 and in effect on July 1, 2004, satisfy the requirements of AS 46.40.070(a)(2)(C)(i) and (iii). However, those enforceable policies must be revised as appropriate to meet all other requirements of AS 46.40.030 and 46.40.070. (Eff. 7/1/2004, Register 170; am 10/29/2004, Register 172)

Authority: AS 46.39.010 AS 46.39.040 AS 46.40.040
AS 46.39.030 AS 46.40.030

The regulations substantially revise the criteria for district enforceable policies. A policy must meet the following requirements established in HB 191, the revised AS 46.40 and the proposed regulations 11 AAC 114. Following is a brief overview of the principal requirements and restrictions on district enforceable policies:

First, the policy must generally relate to one of the following uses or activities [AS 46.40.030 and 11 AAC 114.250 (a)]:

- 112.200 Coastal development
- 112.210 Natural hazard areas (designated areas only)
- 112.220 Coastal access

- 112.230 Energy facilities (designated areas only)
- 112.240 Utility routes and facilities
- 112.260 Sand and gravel extraction
- 112.270 Subsistence (designated areas only)
- 112.280 Transportation routes & facilities
- 114.250 (b) natural hazard designations
- 114.250 (c) recreational use designations
- 114.250 (d) tourism use designations
- 114.250 (e) energy facility sites
- 114.250 (f) fish & seafood processing facilities & sites
- 114.250 (g) subsistence use designations
- 114.250 (h) important habitat designations
- 114.250 (i) historical and prehistorical designations

Second, a district enforceable policy may not address any matter regulated by DEC (AS 46.03, AS 46.06, AS 46.09, AS 46.17 and the regulations there under). This includes policies that are more or less stringent than a DEC standard on a regulated subject area.

Third, the policy may not adopt, duplicate, repeat, restate, or incorporate by reference a state standard or other state or federal law. (AS 46.40.070 (c))

Fourth, if the policy addresses a subject matter regulated or authorized by state or federal law than it must relate to a "matter of local concern." (AS 46.40.070 (d))

Fifth, a "matter of local concern" must be documented in the plan and must, under AS 46.40.070 (a)(2)(C) and 11 AAC 114.230, .240 and .270:

- relate to a specific coastal use or resource within a defined portion of the district's coastal zone, typically identified in the resource inventory.
- relate to an area defined narratively or mapped.
- relate to a coastal use or resource that is sensitive to development.
- address a coastal use or resource that is not adequately addressed by state or federal law.
- relate to a coastal use or resource that is of unique concern to the district through documentation of local usage or scientific evidence.

Sixth, the policy must be clear and concise as to the activities and persons affected and its requirements, and use precise, prescriptive and enforceable language. AS 46.40.070 (a)(2)(A) and (B) and 11 AAC 114.270(e). It must be clear

in either the policy or implementation chapter how to implement, who implements, who enforces, and who has expertise in determining compliance with the policy. The policy must use objective language.

Seventh, the policy must be supported by the resource inventory and analysis 11 AAC 114.270(h).

Eighth, a district plan must to have at least a one policy that can be applied to the designated area during consistency review. A policy that merely "designates" an area would not be allowed. A policy that only provides a designation has no enforceable component.

Ninth, the policies must be clear and concise. HB 191 requires district enforceable policies to be clear and concise regarding "the persons affected by the policies." To meet this requirement, an enforceable policy would need to be clear how the policy is implemented, who implements, who enforces, and who has expertise in determining compliance with the policy. For example, if the policy requires a study be done, it must clarify when the study must be done, who does the study, and how the results of the study are to be used to determine compliance with the ACMP. It must also clarify to who determines consistency regarding compliance with the enforceable policies, or who has the authority to approve the study or find that it is sufficient.

Tenth, a district can reference the state standard. In some cases, it makes sense to build on the existing language of the state standard (such as the coastal development standard). Yet, an enforceable policy can't repeat existing law. A district could write such a policy by including the phrase "In accordance with 11 AAC 112.200 Water-dependent uses include…"

Subsection 10.5.9 – Implementation (11 AAC 114.280)

11 AAC 114.280. Implementation. *A district plan must describe*

(1) the methods and authorities used to implement, monitor, and enforce the district plan; methods and authorities

(A) must be adequate to ensure plan implementation and enforcement;

(B) must describe implementation responsibilities of cities within coastal resource service areas and boroughs; and

(C) may include, if appropriate,

(i) land and water use plans;

(ii) municipal ordinances and resolutions, including shoreline and zoning ordinances, and building codes;

(iii) state and federal statutes and regulations;

(iv) capital improvement programs;

(v) the purchase, sale, lease, or exchange of coastal zone land and water resources;

(vi) cooperative agreements such as memoranda of understanding;

(vii) tax exemptions for non-development purchase of development rights;

(viii) coordinated project or permit review procedures; and

(ix) the means and procedures to document public need for purposes of submitting comments under 11 AAC 110; and

(2) the planning, implementation, and enforcement relationship between the coastal district and the cities or villages inside the district; the district plan must address consistency reviews, any municipal appeals, planning and plan revisions, applicable municipal land use regulations, and review of applicable municipal land use regulations for consistency with the district plan. (Eff. 7/1/2004, Register 170)

Authority: AS 46.39.010 AS 46.39.040 AS 46.40.040
AS 46.39.030 AS 46.40.030

This section of the regulations was not substantially revised.

Subsection 10.5.10: Plan Review Process (11 AAC 114.300 - .385)

11 AAC 114.300 – 340 and 11 AAC 114.350 – 385 were not substantially revised. The revisions are primarily technical, to reflect the relocation of the ACMP into DNR under OPMP, and the deletion of the CPC. These sections generally include the district plan development and approval process for new or amended district plans, the minor amendment process for revisions to district plans that are not significant amendments, procedures for mediation, federal review, local adoption and effective date, reporting, updates to district plans, and petitions for amendments to district plans or regarding non implementation of district plans.

A new requirement of the regulations at 11 AA C 114.375 (b) is that districts shall review and submit the districts coastal management plan to OPMP every 10 years after the plan takes effect.

The transition amendment process at 11 AAC 114.345 is new, and was drafted in particular to streamline the review and approval of the district plan amendments required in House Bill 191. 11 AAC 114.345 explicitly sets forth the list of revisions that are permissible as transitional amendments.

Subsection 10.5.11: Special Area Management Plans and Areas Which Merit Special Attention (11 AAC 114.400 - .430)

These sections were not substantially revised. The revisions are technical, to reflect the relocation of the ACMP into DNR under OPMP, and the deletion of the CPC. For existing AMSAs and SAMPs that are being revised under the transition process at 11 AAC 114.345, the enforceable policies satisfy the requirements that the enforceable policy must relate to a matter of local concern regarding sensitivity

to development and of unique concern to the coastal district AS 46.40.070((a)(2)(C)(i) and (iii).

However, it is important to emphasize that SAMPs and AMSAs must comply with the criteria for enforceable policies at 11 AAC 114.270. As outlined at 11 AAC 114.270(g), an AMSA or special area plan may adopt enforceable policies that will be used to determine whether a specific land or water use or activity will be allowed. An AMSA must contain all of the same elements required of a district plan as well as additional elements, described at 11 AAC 114.420.

As to AMSAs, 11 AAC 114.420(b)(3) requires that an approvable AMSA must include "the district plan elements described in 11 AAC 114.200 – 11 AAC 114.290." See also 114.270(h)(2). Those sections, 11 AAC 114.200 – 11 AAC 114.290, detail the parameters for an approvable district plan, and the same parameters apply to AMSAs. If the regulation was just saying that the same procedures as district enforceable policies applied to AMSAs, then only 114.420(c) would be in there (requiring the procedural aspects of approval at 114.300 – 114.360). The fact that the elements of the district plan approval are incorporated means that the same standards apply to AMSAs.

Therefore, a district may designate an area as an AMSA for one of the uses, activities, and resources listed in 11 AAC 112.200 – 11 AAC 112.240 (coastal development, natural hazard areas, coastal access, energy facilities, and utility routes/facilities), and .260 - .280 (sand and gravel extraction, subsistence, and transportation routes and facilities), or one of the uses, activities, and resources in 11 AAC 114.250(b)- (i) (natural hazard areas, recreational use areas, areas of tourism use, major energy facility sites, commercial fishing/processing facility areas, subsistence areas, important habitat areas, and historical/prehistorical site areas). The AMSA must also comply with all of the other elements of 114.270, including mapping, prohibition against duplication of other law, etc. See AS 46.40.070, AS 46.40.210(7); 11 AAC 114.990(16).

The difference between development of a SAMP versus an AMSA is that a SAMP "must follow the procedures for approval of a district plan or significant amendment as described in 11 AAC 114.300 - 11 AAC 114.360." The SAMP regulation does not, as with AMSAs, require compliance with the substantive district plan criteria from 114.200-270. However, a SAMP is still a part of a district plan. 11 AAC 114.900(16) defines a district plan as including SAMPs and AMSAs. Moreover, 11 AAC 114.270(g) indicates that a SAMP, like a designated area or an AMSA, requires mapping, which mapping "is an enforceable component of a district plan."

Districts have queried the permissibility of a district developing an AMSA under AS 46.40.210(1) and 11 AAC 114.410 without having a coastal management plan, based upon an assumption that AMSAs are designed to be stand-alone plans. Specifically, whether a district simply allow its coastal management plan to sunset and proceed with an AMSA. The answer is that a district cannot have an AMSA without an approved coastal management plan.

As AMSAs are defined by statute [AS 46.40.210(1)], guidance is provided regarding what an AMSA is, rather than the authority from where it derives:

> area which merits special attention" means a delineated geographic area within the coastal area which is sensitive to change or alteration and which, because of plans or commitments or because a claim on the resources within the area delineated would preclude subsequent use of the resources to a conflicting or incompatible use, warrants special management attention, or which, because of its value to the general public, should be identified for current or future planning, protection, or acquisition; these areas, subject to council definition of criteria for their identification, include:…

Thus, to determine the relationship between an AMSA and a coastal management plan, the regulations must be consulted. The AMSA regulations at 11 AAC 114.420(a) (regarding an AMSA within the district) are actually quite clear on the question. Under 11 AAC 114.430(g), "A district may include in the proposed district plan, or submit for approval as a significant amendment to the district's plan, a plan for an area that merits special attention." (emphasis added). Therefore, an AMSA is specifically designed to be a component of a coastal management plan. Even in designating an AMSA, the district must follow the very same requirements for creating a coastal management plan: 11 AAC 114.420(b)(3) specifies, as one of the required AMSA elements, "the district plan elements described in 11 AAC 114.200 - 11 AAC 114.290."

Even a district's attempt to designate an extraterritorial (ET) AMSA "must contain the district plan elements described in 11 AAC 114.200 - 11 AAC 114.290," and "must be in accordance with the procedures for approval of a district plan or a significant amendment to a district plan, as described in 11 AAC 114.305 - 11 AAC 114.320 and 11 AAC 114.330." 11 AAC 114.430(h).

At a minimum, a coastal district must submit a coastal management plan that contains the district plan elements described in 11 AAC 114.200 - 11 AAC 114.290, but could do so in as cursory a fashion as necessary to be approved. Since much of the substance of the district plan elements described in 11 AAC 114.200 - 11 AAC 114.290 could be simply repeated in the districts' re-submittal, the district

might be able to focus on the AMSA, and concentrate its efforts on making the AMSA's requirements the only enforceable policies.

Subsection 10.5.12: General Provisions (11 AAC 114.900 - .990)

This section includes substantive changes to and new definitions of terms that provide the parameters for coastal district plans and the state standards. Most of these new or revised definitions are discussed in context of the affected sections of the regulations discussed throughout this guidance document. In developing district enforceable policies, coastal districts may not redefine any of the terms defined at 11 AAC 110-114, or AS 46.40 (or any other federal or state law, for that matter) as it would repeat, restate, or incorporate by reference an existing state or federal law, thus violate the ACMP statute and regulations. For practical purposed, terms used in the district plan that are existing law could be included in an appendix for reference purposes.

Chapter 11: The Evolution of the ACMP – A List of Routine Program Changes

The following table lists and describes the changes to the ACMP since program inception in 1977. The list is categorized by changes to the ACMP governing statutes, the implementing regulations, and the coastal resource district programs. Each listing includes a description of the change and the year the change became effective. Each of these listing has resulted in a change to the ACMP, with each of them having been submitted to and reviewed and approved by OCRM. While each listing was
not individually submitted for review and approval, each change has been incorporated into the ACMP, and constitutes the structure and makeup of the ACMP as of November 27, 2002.

Statute	*Title*	*Session law & Dates*	*Summary*
AS 44.19	Chapter 19. Office of the Governor Article 6 Office of Management and Budget Article 7 Alaska Coastal Policy Council	Ch 84 SLA **1977 (HB 342)**	Effective **6/4/1977**; establishes the Alaska Coastal Policy Council, and specifies the powers, duties, and Council staff
		Ch 129, SLA **1978 (SB 388)**	Effective **7/9/1978**; amended AS 44.19.891 subsections (d) and (g)
		Ch 63, SLA **1983**	**1983.** Establishes the Office of Management and Budget within the Governor's Office as lead agency for federal consistency. Amends the authorities of the Council staff
		Ch 44 SLA **1990**	Effective retroactive to **3/11/198**4. Changed the requirements for when a state consistency determination is required.
		Ch 168 SLA **1990**	Effective **6/22/1990.** Change to term of public Coastal Policy Council member

		Ch 126, SLA **1994**	Effective **7/1/1994**. Deleted the requirement to submit annually to the legislature portions of the ACOASTAL MANAGEMENT PROGRAM amended by the Coastal Policy Council
		Ch 23, SLA **1995**	Effective **5/11/1995**. Repealed the requirement for preparation of an integrated annual report on the long-range development program of the state. Amended requirement for CPC alternate
		Ch 58 SLA **1999**	Effective **July 1, 1999.** Minor stylistic changes and changed the name of Dept. of Community and Regional Affairs to Dept. of Community and Economic Development. Editorial changes to the descriptions of the regions an terms of the public Coastal Policy Council members
AS 44.47	Chapter 47. Department of Community and Regional Affairs	Ch 84 SLA **1977**	Effective **6/4/1977.** Provides for planning assistance for development and maintenance of district coastal management programs
AS 44.33	Chapter 33. Department of Community and Economic Development	Ch 58 SLA **1999**	Effective **7/1/1999.** Minor stylistic changes and changed the name of Dept. of Community and Regional Affairs to Dept. of Community and Economic Development. Moves the section to a new Chapter of Title 44, from Ch 47 to Ch 33.
AS 46.40	Chapter 40. The Alaska Coastal Management Program	Ch 84 SLA **1977 (HB 342)**	Effective **6/4/1977**; creation of Chapter 35 The Alaska Coastal Management Program **(AS 46.35)**;
		Ch 60 SLA **1977 (SB 227)**	Effective **10/1/1977** amended AS 46 by adding a new chapter AS 46.35 Environmental Procedures Coordination and creating **AS 46.40**

AS 46.40.030	Development of district coastal management program	Am. Ch 28 SLA **2002 (SB 308)**	Effective **5/30/2002**; added subpara. (b) – in developing statements of policies and

			regulations, a coastal resource district may not incorporate by reference statutes & regs adopted by state agencies

AS 46.40.040	Duties of the Alaska Coastal Policy Council	Am. Ch 129 SLA **1978 (SB 388)**	Effective **July 9, 1978** with section 1 retroactive to **June 4, 1977**, AS 46.40.040(1) was amended to adopt regulations no later than April 15, 1978 (Regulations needed in order to allow the state program to receive federal approval by December of 1978.)
		Am. Ch 34 SLA **1994 (SB 238)**	Effective **8/7/1994**; federal routine program change 9/19/94 added para. (6) – by regulation establish a consistency review & determination or certification process for AS 46.40.096

AS 46.40.050	Action and submission by coastal resource districts	Am. Ch 66 SLA **1979 (SB 145)**	Effective **8/16/1979**; AS 46.40.050 amended to provide a reasonable extension for an approvable district coastal management program if considered proper.

AS 46.40.094	Consistency determinations for phased uses and activities	Ch 38 SLA **1994 (SB 308)**	Effective **8/7/1994** – added new section AS 46.40.094 Consistency determinations for phased uses and activities.
		Am. Ch 28 SLA **2002 (SB 308)**	Effective **5/30/2002** – added subsection (d) – allows agencies to review & make the consistency determination in separate phases for a natural gas line pipeline project from the North Slope
		Am. Ch 29 SLA	Repealed para. (d)(2)-

		2002 (HB 439)	
AS 46.40.096	Consistency reviews and determinations	Ch 34 SLA **1994 (SB 238)**	Effective **8/7/1994** – added new section AS 46.40.096 Consistency reviews and determinations.
		Am. Ch 29 SLA **2002 (HB 439)**	Effective**5/30/2002** – amending AS 46.40.096(d) by deleting subsection (4)
		Am. Ch 44 SLA **2002 (SB 371)**	Effective **8/8/2002**, Sec. 2 retroactive to August 1, 1998; Subsection (h) was part of Subsection (g) [originally (h)] was added in 2002 and is retroactive to Aug. 1, 1998 – reviewing entity may exclude from the consistency review & determination process for a project that have been fully considered.
AS 46.40.100	Compliance and Enforcement	Am. Ch 34 SLA **1994 (SB 238)**	Effective **8/7/1994** – amending AS 46.40.100(b) – the when and how certain parties can petition the Coastal Policy council during an ACOASTAL MANAGEMENT PROGRAM consistency review.
		Am. Ch 29 SLA **2002 (HB 439)**	Effective **5/30/2002**, Sec. 3 AS 46.40.100(b) added "A petition filed under this subsection may not seek review of a proposed or final consistency determination regarding a specific project." Section 7 added a new subsection (h) – permit a coastal resource district, . . . to file a petition showing that a district coastal management program is not being implemented . . . and council could order a coastal resource district . . . to take action with respect to future implementation of the plan.

AS 46.40.120	Coastal Resource Service Areas	Ch 48 SLA **1980**	Effective **1980.** Added a provision that a CRSA formed before June 1, 1980 may not be divided for coastal management planning purposes
AS 46.40.140	Coastal Resource Service Area Boards	Ch 74 SLA **1985**	Effective**1985**. Revised provisions for CRSA board elections
		Ch 129 SLA **1990**	Effective**1990.** Revised provisions for CRSA board elections
Regulation	***Title***	***Register Number & Dates***	***Summary***
6 AAC 50	Title 6 Governor's Office. Alaska Coastal Policy Council. Chapter 50. Process for consistency determination, review, and petition for coastal management	Register 89, **1984**	Effective. **3/11/1984.** Establishes the regulations governing project consistency with the ACOASTAL MANAGEMENT PROGRAM
		Register 114, **1990**	Am. **5/1/1990- 8/9/1990**. Changed requirements for state permit consistency review requirements; scope of review; consistency review process; conclusive consistency determination; definitions
6 AAC 50.050	Expedited review by categorical approval and general concurrence determinations	**1990**	Federal routine program change **1990.** Comprehensive revision to the Classification of State Approvals (ABC List)
	Expedited review by categorical approval and general concurrence determinations	**1992**	Federal routine program change **9/17/1992**. Comprehensive revision to the Classification of State Approvals (ABC List)
	Expedited review by categorical approval and general concurrence determinations	**1992**	Federal routine program change **12/11/1992** . Revision to add approvals granted by the Environmental Protection Agency pursuant to

			Subtitle C of the Resource Conservation and Recovery Act of 1972, as amended.
6 AAC 50	Title 6 Governor's Office. Alaska Coastal Policy Council. Chapter 50. Process for consistency determination, review, and petition for coastal management	Register 126, **1993**	Am **5/20/1993.** Federal routine program change 3/15/94. Revised sections of 6 AAC 50.070, .110, and .190 intended to address differences between the State's review of oil spill contingency plans under the ACOASTAL MANAGEMENT PROGRAM and the review conducted pursuant to the State's oil spill planning statute
6 AAC 50.050	Expedited review by categorical approval and general concurrence determinations	**1994**	Federal routine program change **4/5/1994.** Comprehensive revision to the Classification of State Approvals (ABC List)
		1995	Federal routine program change **8/16/1995.** Comprehensive revision to the Classification of State Approvals (ABC List)
6 AAC 50	Title 6 Governor's Office. Alaska Coastal Policy Council. Chapter 50. Process for consistency determination, review, and petition for coastal management	Register 150, **1999**	Am**. 7/1/1999.** Procedures for process petitions to the Coastal Policy Council adopted. Added provision regarding state response to a federal consistency determination
		Register 153, **2000**	Am **2/13/2000.** Amended requirements regarding eligibility to petition on a proposed consistency determination. Added definition of a citizen of an affected coastal district.
		Register 164, **2003**	Effective. **1/21/2003.** Comprehensive revision to the State consistency review process and implementation of the ACOASTAL MANAGEMENT PROGRAM and specific

			inclusion of general and nationwide permits, categorically consistency determinations, and general consistency determination.
6 AAC 80.	Title 6 Governor's Office. Alaska Coastal Policy Council Chapter 80. Standards of the ACOASTAL MANAGEMENT PROGRAM	Register 67, **1978.**	Effective.**7/18/1978.** Establishes the Standards of the ACOASTAL MANAGEMENT PROGRAM
		Register 71, **1979**	Effective **8/18/1979**. Amends the Recreation Standard, Timber Harvest Standard, Mining and Mineral Processing Standard, Energy Facilities Standard, Transportation Standard, Coastal Development Standard and definitions
		Register 79, **1981**	Effective **9/9/1981.** Revised the sections regarding the coverage of the chapter and definitions
		Register 92, **1984**	Effective **10/28/84** Removes the Coastal Policy Council from review of State consistency actions. Outlines the responsibilities of the Division of Governmental Coordination in the Office of Management and Budget as lead agency for the implementation of the ACOASTAL MANAGEMENT PROGRAM. Revised Timber Harvest and Processing Standard
	Article 4. Areas Which Merit Special Attention	Register 94, **1985**	Effective. **6/9/1985** Amendments to reflect coastal district role in the state consistency review process. Revised section governing the contents of and review and approval process for district coastal management programs. Establishes the process and requirements for extra-territorial Areas Which Merit Special

			Attention (AMSAs). Revised requirements for contents of AMSAs inside districts. Adds a process for mediation when the Coastal Policy Council disapproves all or part of a district coastal management program or AMSA.
		Register 97, **1986**	Am. **4/2/1986.** Revised requirements for content and approval of AMSAs inside and outside of districts
		Register 151, **1999**	Repealed **7/16/1999.** Revised and moved this sections to 6 AAC 85
	Article 5 General Provisions	Register 104, **1987**	Am. **10/16/1987.** Amended the definitions section
		Register 126, **1993**	Am. **5/20/93**. Revised the Air, Land and Water Quality Standard to include revisions to the Department of Environmental Conservation's statutes, regulations and procedures in Effective on August 18, 1992.
6 AAC 80.158, 160, 170	Article 4 Areas Which Merit Special Attention	Register 151, **1999**	Repealed **7/16/1999.** Moved the sections relating to AMSAs to 6 AAC 85
6 AAC 85	Chapter 85. Guidelines for District Coastal Management Programs	Register 67, **1978**	Effective. **7/18/1978.** Established the guidelines for district coastal management programs
		Register 71, **1979**	Am **8/18/1979.** Revised the government process regarding review and approval of district coastal management programs
		Register 79, **1981**	Am **9/9/1981.** Revised section governing the Coastal Policy Council review of coastal district program final findings and conclusions and concept approved drafts; revised the definitions section

	Register 89, **1984**	Am **3/2/1984.** Amended the section regarding enforceable policies and Article 2 the government process. Amendments to reflect coastal district role in the state consistency review process. Revised section governing the contents of and review and approval process for district coastal management programs. Establishes the process and requirements for extra-territorial Areas Which Merit Special Attention (AMSAs). Revised requirements for contents of AMSAs inside districts. Adds a process for mediation when the Coastal Policy Council disapproves all or part of a district coastal management program or AMSA.
	Register 99, **1986.**	Effective. **8/23/1986.** Established a process for petitions to the Coastal Policy Council for amendment to an approved district program regarding uses of state concern at 6 AAC 85.185
	Register 151, **1999**	Am. **7/16/1999.** Comprehensive amendments to entire chapter to streamline the process for minor district program amendments, provide for special area management planning, strengthen provisions for periodic review and update of district coastal management programs, and clarify and strengthen the district coastal management program elements and process for state agency review and Division of Governmental Coordination (now OPMP) review and approval of district coastal management programs. Provides for local

			knowledge in the development of district coastal management programs. Clarifies the relationship and responsibilities of cities within Coastal Resource Service Areas.
Coastal District	***Title***	***Effective Date***	***Summary***
City of Haines	Haines Coastal Management Program	1980	Original district coastal management program which includes the Port Chilkoot/Portage Cove area which merits special attention
City and Borough of Sitka	Sitka Coastal Management Program	1981	Original district coastal management program
Municipality of Anchorage	Anchorage Coastal Management Program	1981	Original district coastal management program which includes 10 areas which merit special attention within the coastal district
City and of Yakutat	Yakutat Coastal Management Program	1982	Original district coastal management program
City of Klawock	Klawock Coastal Management Program	1983	Original district coastal management program
City of Skagway	Skagway Coastal Management Program	1983	Original district coastal management program
Prince of Wales Island	Southern Southeast Areas Which Merit Special Attention	1983	Original six extra territorial areas which merit special attention; five of which are near southern Prince of Wales Island, one of which is partially inside and outside the City of Hydaburg
Bristol Bay Borough	Bristol Bay Borough Coastal Management Program	1984	Original district coastal management program
City of Bethel	Bethel Coastal Management Program	1984	Original district coastal management program

City of Hydaburg	Hydaburg Coastal Management Program	1984	Original district coastal management program
City of Nome	Nome Coastal Management Program	1984	Original district coastal management program, approved in March
City of Nome	Nome Coastal Management Program	1984	Revision to the district coastal management program to change the designation of an area in July
City of Pelican	Pelican Coastal Management Program	1984	Original district coastal management program
Ketchikan Gateway Borough	Ketchikan Coastal Management Program	1984	Original district coastal management program
Matanuska-Susitna Borough	Matanuska-Susitna Borough Coastal Management Program	1984	Original district coastal management program
Matanuska-Susitna Borough	Matanuska-Susitna Borough Coastal Management Program	1984	Revision to the district coastal management program to revise a few enforceable policies
Cenaliulriit Coastal Resource Service Area (CRSA)	Cenaliulriit Coastal Management Program	1985	Original district coastal management program
City and Borough of Sitka	Sitka Coastal Management Program	1985	Revision to the entire district coastal management program
City of Craig	Craig Coastal Management Program	1985	Original district coastal management program
City of Kake	Kake Coastal Management Program	1985	Original district coastal management program
City and Borough of Juneau	Juneau Coastal Management Program	1986	Original district coastal management program

City of Cordova	Cordova Coastal Management Program	1986	Original district coastal management program
Prince William Sound	Eyak Lake Area Which Merits Special Attention	1986	Original area which merits special attention partially inside and outside of the City of Cordova
Bristol Bay Coastal Resource Service Area (CRSA)	Bristol Bay CRSA Coastal Management Program	1987	Original district coastal management program
City of Valdez	Valdez Coastal Management Program	1987	Original district coastal management program
Matanuska-Susitna Borough	Matanuska-Susitna Borough Coastal Management Program	1988	Revision to the district coastal management program to revise a set back policy
North Slope Borough	North Slope Borough Coastal Management Program	1988	Original district coastal management program
Aleutians East CRSA	Aleutians East CRSA Coastal Management Program	1989	Original district coastal management program
Bering Straits CRSA	Bering Straits CRSA Coastal Management Program	1989	Original district coastal management program
City and Borough of Sitka	Sitka Coastal Management Program	1989	Revision to the district coastal management program to update enforceable policies and to add Swan Lake Area Which Merits Special Attention within the City and Borough of Sitka
City of Saint Paul	Saint Paul Coastal Management Program	1989	Original district coastal management program
Northwest Arctic Borough	Northwest Arctic Borough Coastal Management Program	1989	Original district coastal management program (Northwest Arctic Borough was originally a CRSA, but formed a borough during the planning process)

City of Angoon	Angoon Coastal Management Program	1990	Original district coastal management program
City of Craig	Craig Coastal Management Program	1990	Revision to the district coastal management program to include annexed areas
City of Skagway	Skagway Coastal Management Program	1990	Revision to update the district coastal management program which includes the Pullen Creek and Yakutania Point areas which merits special attention
City of Whittier	Whittier Coastal Management Program	1990	Original district coastal management program
Kenai Peninsula Borough	Kenai Peninsula Borough Coastal Management Program	1990	Original district coastal management program
Bristol Bay CRSA and Lake and Peninsula Borough	Nushagak and Mulchatna River Recreation Management Plan	1990	Original area which merits special attention which is located within both the Bristol Bay CRSA and the Lake and Peninsula Borough
Aleutians West CRSA	Aleutians West CRSA	1991	Original district coastal management program
City of Skagway	Skagway River and Skagway River Areas Which Merit Special Attention	1991	Original two areas which merit special attention located within the city
Aleutians East Borough	Aleutians East Borough Coastal Management Program	1992	Revised the Aleutians West CRSA district coastal management program to reflect the change in status from a CRSA to a borough; to include new areas; and to update the resource inventory and analysis and enforceable policies and other plan elements
Municipality of Anchorage	Anchorage Wetlands Management Plan	1992	Original special area management plan
Admiralty Island	Chaik-Whitewater Bay Area Which Merits Special Attention	1992	Original extra territorial area which merits special attention located outside the City of

			Angoon
Admiralty Island	Hood Bay Area Which Merits Special Attention	1992	Original extra territorial area which merits special attention located outside the City of Angoon
City of Angoon	Mitchell Bay Area Which Merits Special Attention	1992	Original extra territorial area which merits special attention located partially inside and outside the City of Angoon
City and Borough of Juneau	Juneau Coastal Management Program	1992	Original district coastal management program which includes the Downtown Waterfront area which merits special attention
City of Thorne Bay	Thorne Bay Coastal Management Program	1992	Original district coastal management program
Kenai Peninsula Borough	Port Graham/Nanwalek Bay Area Which Merits Special Attention	1992	Original area which merits special attention located within the Kenai Peninsula Borough
City and Borough of Sitka	Sitka Public Use Management Plan	1992	Original special area management plan located within the City and Borough of Sitka
City of Haines	Haines Coastal Management Program	1993	Revision to the district coastal management program to update enforceable policies and include annexed areas
City and Borough of Juneau	Juneau Wetlands Management Plan	1993	Original special area management plan
Matanuska-Susitna Borough	Point MacKenzie Area Which Merits Special Attention	1993	Original area which merits special attention located within the Matanuska-Susitna Borough
City of Pelican	Pelican Coastal Management Program	1994	Revision to the district coastal management program to update enforceable policies
Municipality of	Anchorage Wetlands Management	1996	Revision to the special area management plan

Anchorage	Program		
Lake and Peninsula Borough	Lake and Peninsula Borough Coastal Management Program	1996	Original district coastal management program
City and Borough of Sitka	Sitka Public Use Management Program	1997	Revision to the special area management plan to add areas and update enforceable policies
City of Hoonah	Hoonah Coastal Management Program	1997	Original district coastal management program
City of Thorne Bay	Thorne Bay Coastal Management Program	1998	Revision to the district coastal management program to update policies and include annexed areas
Northwest Arctic Borough	Northwest Arctic Borough Coastal Management Program	1998	Revision to the district coastal management program to update the plan and include annexed areas
Cenaliulriit CRSA	Cenaliulriit Coastal Management Program	1999	Revision to the district coastal management program to update the enforceable policies and to address subsistence use
City and Borough of Yakutat	Yakutat Coastal Management Program	1999	Revision to the district coastal management program to update enforceable policies and to reflect the new borough status
City of Saint Paul	Saint Paul Coastal Management Program	2000	Revision to the district coastal management program to update the enforceable policies